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A vindication of the Free
Church Claim of Right

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A VINDICATION

OF THE

FREE CHURCH CLAIM OF RIGHT.

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FREE CHURCH CLAIM OF RIGHT.

BY

SIR HENRY WELLWOOD MONCREIFF, BART., D.D.

WITH AN

APPENDIX RELATING TO ALLEGED FACTS.

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PREFACE.

The Free Church of Scotland appeals to the Claim of Right, Declaration, and Protest, adopted by the General Assembly of the Established Church in 1842, as exhibiting the foundation of scriptural principle and constitutional privilege on which she builds her peculiar position. In the memorable Protest read and laid on the table in presence of the Royal Commissioner on the 18th of May, 1843, those who signed it protested that the Claim agreed to in the previous year, and since brought under consideration of Parliament, must be considered as setting forth the true constitution of the Church of Scotland, and that no Assembly must be regarded as a true Assembly of that Church which is not held on the footing of it. The document, therefore,

is a great historical paper in the estimation of well-informed Free Churchmen, and of many other people.

It seems desirable that, at the present stage of ecclesiastical progress, the substance of it should be exhibited in a different form from the technical one which its original occasion called for. The object of the present work is to contribute something towards a clear perception of its grounds and meaning by the existing and by future generations. I know I am liable to a charge of great presumption for appearing to enter the sphere of legal opinion and criticism, especially where judicial decisions are concerned. It might, perhaps, have been more suitable for a professional lawyer to have dealt with the subject. But it is the business of a lawyer to deal rather with the question what the law is now as actually declared, than with what he may think ought to have been formerly declared, and the subject of our Claim of Right is a complex one, embracing more than one class of questions. Its vindication requires that the views through which it was rejected and overborne should be freely canvassed. I have endeavoured,

however, to perform the task of recording and illustrating the conclusions of thoroughly competent parties, and do not expect that the smallest value should be assigned to my own conceptions, except in so far as they seem to be supported by the authorities which I quote.

I pretend to no originality in any portion of what I have written. I acknowledge my obligations to the works of Dr. M'Crie the biographer of Knox and Melville, the late Principal Cunningham, the late Dr. Robert Buchanan, Mr. Taylor Innes, and several other writers. I have not aimed at presenting anything which is really *new*, but simply at a compilation, by which many convincing statements and arguments may be set forth together in their special relation to a particular document. Circumstances in my history and position have shut me up to the duty of undertaking this compilation. I trust that it may be blessed for the highest ends. And I hope and pray that, having in some measure executed what seemed laid upon me, I may be now enabled, with more earnestness and freedom than before, to follow out the immediate purposes of a gospel ministry, in preach-

ing the cross of Christ, and striving for the salvation of sinners, the edification of Christ's people, and the unity of His Church.

In the Appendix, I have dealt specially with the allegations of Andrew Macgeorge, Esq., writer, Glasgow, who published successive pamphlets under the name of "Veritas," and who has since put them together in a collected form, with his own name attached to them. I have had no desire to treat this gentleman otherwise than respectfully and courteously. But he has used very strong language against the grounds of Free Church movement, and it is impossible to treat his statements adequately without decisive condemnation.

H. WELLWOOD MONCREIFF.

EDINBURGH, *May*, 1877.

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VINDICATION OF THE CLAIM OF RIGHT.

PART I.

Introductory—Its Principles and the Corresponding Lines of Action.

CHAPTER I.

THE OLD FOUNDATIONS OF FREE CHURCH PRINCIPLE.

1. Statements in the Westminster Confession of Faith.

My object leads me to reason chiefly with persons who adopt the statements of the Westminster Confession. It indicates that civil governments are required to recognise Christ as Heir of all things, and as the supreme Lord and King of all the world. It represents them as having both authority and duty to honour His name, countenance His Gospel, and promote the welfare and progress of His Church. But it expressly declares, on the other hand (chap. xxiii. 3), not only that "the civil magistrate may not assume to himself the administration of the Word and sacraments," but that he may not

assume to himself "the *power* of the keys of the kingdom of heaven;" and it further asserts (chap. xxx.) that "the Lord Jesus, as King and Head of His Church, hath therein appointed a government in the hand of church-officers, *distinct* from the civil magistrate." These expressions appear to signify that there is, by Christ's appointment, a *power* of government in His Church, which it is the sacred duty of church-officers to carry on with a simple regard to His own voice in His Word, and without submission to interference by civil rulers.

The Duke of Argyll takes for granted, in his essay on our ecclesiastical history, that such is the meaning of the Confession. He represents it as saying of Christ and Church government, "That He has ordained that this government should never, under any circumstances, be interfered with by, or be merged in the civil government of society."[1] The Duke disputes the proposition, but his description is accurate; for by "the civil magistrate" is evidently meant, not subordinate magistracy, but the supreme government of the State; and if Christ has appointed the power of ecclesiastical government to be distinct from it, no circumstances can, on Christian principles, justify interference with the distinctness, or warrant the merging of ecclesiastical in civil government.

The questions remain, "What is the sphere of action assigned by Christ to the distinct government? What

[1] Essay, Note H, p. 317; also Appendix, No. III.

are the matters over which its power is exclusive?" The statements of the Confession involve a belief that decisive answers to these questions can be found in the Word of God. This was the belief of the General Assembly when adopting it in 1647. Upon this belief we now take our stand, and appeal to the Westminster Confession as teaching that every truly Christian Church has, by appointment of her Divine Head and King, a jurisdiction absolutely distinct from and thoroughly co-ordinate with the jurisdiction of the particular civil government under which in temporal things she is placed, and that an obligation rests upon her, in faithfulness to Him, to assert and maintain it at all hazards. By spiritual independence we mean the liberty of a Church to fulfil the obligation thus laid upon her by her Lord.

Besides the principle of Spiritual Independence, the framers of the Claim of Right contended for what they called the principle of Non-intrusion in the settlement of ministers. That principle is not announced in the Westminster Confession nor in the Free Church Formula. It is not, therefore, regarded by the Free Church as a matter of faith to which all ministers and elders are bound. But it was felt by the majority of the General Assembly from 1834 till 1843 to be matter of scriptural obligation, upon which they were conscientiously obliged to act when the power of the Assembly was in their hands.

2. Views of Reformers before the time of Andrew Melville.

Scottish conceptions in 1647 on the relations of Church and State sprung from discussions commenced more than a hundred years previously. "The magistrate," exclaimed Œcolampadius, the Swiss Reformer (in a letter to Zuingle before 1530, as quoted by Merle D'Aubigné), "who should take away from the Churches the authority that belongs to them would be more intolerable than antichrist himself. . . . The hand of the magistrate strikes with the sword, but the hand of Christ heals. Christ has not said, If thy brother will not hear thee, tell it to the magistrate; but *tell it to the Church.* The functions of the State are distinct from those of the Church." He asserted his views before the senate of Basle and a Synodal Assembly with temporary success. But the powers of this world and the attractions of their support were too strong in their influence over the great body of continental Reformers, who, without much consideration, and having their attention fixed on the contest with Rome, allowed the Churches founded by them to fall into an Erastian condition.

Calvin, when expounding in his Commentary the passages of the New Testament which contain instructions and promises relative to the keys of the kingdom of heaven, to the remission and retaining of sins, and to the

Divine presence with the Church, gives them an application to the action in his own time of the Reformed Churches as distinct visible societies. He confirms this exposition in his Institutes, but it took full practical effect only in Scotland, where the continued opposition of the court to the Protestant cause gave opportunity to the Reformers for independently constructing an ecclesiastical system according to conceptions taken from the Word of God.

In his first sermons at St. Andrews in 1647, John Knox taught that "no mortal man could be head of the Church;" and in 1561 he and his coadjutors produced the First Book of Discipline, which assumes throughout that the Church had by Divine authority a *distinct* province, in which she was called to act with vigour.[1] In the same year Knox declared that "to take away the freedom of Assemblies was to take away the Gospel." From that date till 1567 the General Assemblies of the Church met regularly, and acted upon their Book of Discipline without the sanction of secular authority. In 1571 we find Erskine of Dun, in a letter to Regent Mar, maintaining that "God hath given a spiritual jurisdiction and power to His Church, and to those that bear office therein, and a temporal jurisdiction and power to kings and magistrates." "Both the powers," he says, "are *of God*, and most agreeing to the fortifying one of the other, if they be right used. But when the cor-

[1] Appendix, No. III.

ruption of man enters in, confounding the offices, usurping to himself what he pleases, nothing regarding the good order appointed of God, then confusion follows in all estates. The Kirk of God should fortify all lawful power and authority that belongs to the civil magistrate, because it is the ordinance of God; but if he pass the bounds of his office, and enter within the sanctuary of the Lord, meddling with such things as appertain to the ministers of God's Kirk, then the servants of God should withstand his unjust enterprise, for so are they commanded of God."

Up till 1574 there had not been much leisure or occasion for defining the limits of civil and ecclesiastical jurisdiction in Scotland. The absence of the principle of toleration tends in some measure to obscure the character of the opinions expressed at that period. But the action of the Church had implied what was afterwards more exactly set forth.

The First Book of Discipline laid a foundation for the principle of Non-intrusion, by the statement that "it appertaineth to the people and to every several congregation to elect their minister."

3. Views of Andrew Melville as embodied in the Second Book of Discipline.

In 1674 Andrew Melville returned to Scotland, after an absence abroad for ten years spent in study. His

biographer, Dr. M'Crie, has proved that his academical course from his twelfth till his thirtieth year had made him pre-eminent in high cultivation and scholarship; that his acquaintance with both the classical and the Oriental languages was extraordinary; and that his theological knowledge was full and readily available, as well as deeply grounded. Intercourse with professors and divines on the Continent, and familiarity with agitated questions, completed the qualifications which that accurate author has ascribed to him for performing an important part in Scottish affairs. He appeared first of all as an ardent scholar, zealous for the progress of sound literature in his native land. The evidence is abundant that in his time Presbyterian scholarship became superior to that of contemporary Episcopacy.

The pressure of events led Melville at last to concentrate his powers on the vindication of what he regarded as a scriptural system of ecclesiastical order in opposition to the Erastianism of James and his courtiers. He had able associates. The Duke of Argyll and others represent the prominent ecclesiastics of that day as generally inferior to Knox and their other predecessors; but Dr. M'Crie shows that they do so groundlessly. The real difference is, that the knowledge of the later generation was more enlarged and accurate, and their opinions more matured.

The Second Book of Discipline was framed under their

influence in 1678. It represents the principles of Melville, and is admitted by the most conspicuous opponent of the Church of Scotland in the conflict before the Disruption —the Dean of Faculty Hope—to contain the doctrine regarding spiritual independence which was asserted by the General Assembly in 1838. It declares that the Church has a power or authority granted by God the Father through the Mediator Jesus Christ, having ground in the Word of God, to be put in execution by those to whom the spiritual government is committed by lawful calling; that this power is different and distinct in its own nature from the civil power, though they are both of God, and tend to one end if rightly used; that the ecclesiastical power flows immediately from God and the Mediator Jesus Christ, and is spiritual, not having a temporal head on earth, but only Christ, the only Spiritual King and Governor of His Church, who rules through His Word and Spirit by the ministry of men; that it should lean upon the Word immediately, and be taken from the pure fountains of the Scriptures—the Church hearing the voice of Christ, and being ruled by His laws; and that the exercise of both the ecclesiastical and the civil jurisdiction cannot stand in one person ordinarily—the civil power being called the power of the sword, and the ecclesiastical the power of the keys.

The statement is also made that not only ought the civil magistrate neither to preach, minister the sacra-

ments, nor execute the censures of the Church, but that he has no right *to prescribe any rule how these things should be done,* although he may command the ministers to observe *the rule commanded in the Word,* and punish the transgressors by civil means. The liberty allowed by this last statement to the civil magistrate in ecclesiastical matters may be thought to involve those intolerant ideas which the most enlightened men of the sixteenth century had not abandoned. But that liberty was manifestly not designed by the authors of the Second Book of Discipline to affect the principle of an absolute spiritual independence in the government of the Church. For the only thing which they allow the civil magistrate to enforce upon the ministers is the rule *commanded in the Word.* In the event of the superior ecclesiastical authorities agreeing with the civil power on the subject of that rule, it may have been intended that then the latter might, if need be, enforce the view of those authorities upon individual ministers by civil pains and penalties.

In case, however, of disagreement between the two powers, it is evident from the previous declarations that the Church was held to be under obligation to Christ to take the rule of His Word, not from the civil power, but exclusively from the voice of Christ speaking to her own mind and conscience by His Spirit in her reading of that Word. Thus a difference in the interpretation of the Word might possibly, according to the intolerant doctrine

of the time, oblige the civil magistrate to persecute the Church, and oblige the Church to encounter persecution in following what she believed to be the mind of her Lord in the exercise of her spiritual functions. But no such difference could bind the Church to surrender the power of the keys into the hands of the civil magistrate, nor excuse her in departing from her own conscientious reading of Christ's Word in the use of that power. The several announcements of the Book of Discipline can only be reconciled by assuming the possibility of collision between two distinct and independent jurisdictions. According to those announcements, the civil government must either respect the absolutely distinct and independent government of the Church which it recognises, or must cease to recognise—or perhaps even to tolerate—that Church at all.

The Dean of Faculty Hope denied that the portion of the Second Book of Discipline to which I have referred was sanctioned by the Act of Parliament in 1592, and objected to it on the ground that it claimed a *power of ecclesiastical government as a matter spiritual flowing directly from Divine authority*, and thereby gave foundation for the claims of the Church of Scotland in 1839. His representation of its meaning is borne out by the manner in which its declarations were acted on. Montgomery, appointed Archbishop of Glasgow by authority of the Privy Council at a time when Episco-

pacy stood condemned by the General Assembly, accepted of the appointment upon terms which were very degrading, and his conduct was regarded by the Church as subjecting him to censure. The Church Courts went firmly on in the exercise of their independent jurisdiction, though physical force had been brought to bear upon them. Sentence of excommunication was pronounced against Montgomery, and when that sentence had been declared null and void by the Privy Council, the General Assembly, guided by Melville, drew up a remonstrance, complaining that the authority of the Church had been abrogated, and that the two jurisdictions which God had divided were confounded.

The course thus taken by the Church in this and other cases bore fruit afterwards, when in 1592 her Discipline was to a large extent ratified by Parliament. The whole of the book had been adopted by the Assembly in 1581, and in an interview with King James in 1596, Melville told his majesty that there were two kings and two kingdoms in Scotland—King James, the head of the commonwealth, and Christ Jesus, the King of the Church; and that those whom Christ had called and commanded to watch over His Church had power and authority from Him to govern His spiritual kingdom, both jointly and severally, which power and authority no Christian king or prince should control and discharge, but fortify and assist.[1]

[1] Appendix, No. III.

The ecclesiastical independence thus asserted was afterwards overborne, partly by policy, and partly by oppression. But the particulars which I have mentioned prove that, at an era of high Presbyterian attainment in scholarship and knowledge, and of intense opposition to Popish and Prelatic claims, the most prominent and accomplished men contended for that very distinct and absolutely co-ordinate jurisdiction in the Church which it is now the fashion to stigmatise as corresponding to the usurpations of Rome. Let it be remembered, also, that shortly after the production of the Second Book of Discipline, Beza, the successor of Calvin at Geneva, and the special opponent of Erastus, expressed in a letter to the Chancellor Glammis a decided judgment in favour of the principles set forth in that book.

As regards the principle of Non-intrusion, the Claim of Right specially refers to the assertion of it in a declaration of the Second Book of Discipline, "that no person should be intruded into any of the offices of the Church contrary to the will of the congregation." That book also condemns the system of patronage, as what ought not to be allowed in a time of Reformation.

4. Views held in Scotland during the Period of the Second Reformation, from 1638 till 1660.

Political events compelled Charles the First to call a meeting of the General Assembly in 1638. He hoped

to conciliate its members by delusive expectations, and was resolved not to yield the principle of the royal supremacy. But the Christian persistency of the ministers and elders overcame his policy, and reasserted the co-ordinate jurisdiction and spiritual independence of the Church. Led by Alexander Henderson, their moderator, they declined to surrender what they counted their scriptural liberty in ecclesiastical government. And when the Royal Commissioner on this account dissolved the Assembly, they continued their sittings for a month, on the footing of their right to meet independently of royal warrant, and restored the arrangements required by the Second Book of Discipline. The Church proceeded in the same line of action while she had liberty to do so, and maintained her ground throughout the persecutions which preceded the Revolution of 1688.

An attempt has been made, by quotations from the writings of George Gillespie and Samuel Rutherford, to defend an interpretation of the twenty-third chapter of the Westminster Confession which would contradict the doctrine of an absolute distinctness and independence in ecclesiastical government. But the late Principal Cunningham has shown that these quotations only prove the influence which intolerant views still exercised over these excellent men, so as to make them extend the magistrate's power, with reference to external things affecting the Church, to a point which would now be

regarded as involving persecution. They have nowhere stated that the civil magistrate is warranted, on any account, in exercising authoritative control over the supreme authorities of the Church in the exercise of their functions, and still less that those authorities are at liberty upon any account to depart from their own judgment of what the Divine Word requires, out of deference to the civil power.

There is one passage in Rutherford's writings which is dwelt upon as if it contradicted this representation—a passage in which he distinguishes between an appeal from a Church Court to the civil magistrate and a complaint to him as the only refuge against a sentence contrary to the *Word of God.* He denies the competency of an *appeal,* but holds such a *complaint* as he speaks of to be warrantable. But the nature of the case referred to evidently implies a man having recourse, not to a higher court, but to the supreme power of the State, for the vindication of *truth.* And as the question would evidently turn on the view taken of what the *Word of God* requires, the Church could not, even according to this statement of Rutherford, be under obligation to obey the civil power in opposition to her own conscientious interpretation of that Word. There is not a sentence in the writings either of Rutherford or Gillespie to warrant the modern claim on the part of the State or its Civil Courts to coerce or interdict ecclesiasti-

cal action for the sake of enforcing civil rights, or carrying out the judgments of secular politicians on questions of expediency.

It is needless, however, to examine particularly the several statements adduced, because, in relation to Gillespie, the inferences drawn from them are contradicted by a document which has been overlooked by the parties making the attempt referred to, but to which Dr. Cunningham has called attention. I refer to a pamphlet printed by the General Assembly of 1647, entitled "An Hundred and Eleven Propositions regarding the Ministry and Government of the Church." These propositions were prepared by Gillespie and Baillie. It is asserted in this document that the Church ought to be governed by no other persons than ministers and stewards preferred and placed by Christ, and after no other manner than according to the laws made by Him; that, therefore, there is no power on earth which can challenge to itself authority or dominion over the Church; that the voice of no one should take place, or be rested upon, in the Church but the voice of Christ alone; that Jesus Christ, the only Head of the Church, hath ordained in the New Testament not only the preaching of the Word and administration of the sacraments, but also *ecclesiastical government*, distinct and differing from the civil government; that His will is to have such a government distinct from the civil in all His Churches everywhere, as

well those which live under Christian as those under infidel magistrates, even unto the end of the world; that the civil power and the ecclesiastical ought not by any means to be confounded or mixed together; that by marvellous vast differences are they distinguished one from the other, and the rights of both remain distinct; that the power ecclesiastical dependeth immediately upon the positive law of Christ alone, and belongs to the special kingdom which He exercises in the Church alone, and which is not of this world; and that the civil power, in dealing with the Church, can be rightly occupied only about its outward business or external things, which reach only to the external state and condition of its ministers and members.

It is undoubtedly contended at the same time, in more than one of these propositions, that the civil magistrate is called upon to maintain the truth of God, and, in some circumstances, to punish by civil pains those who oppose it; that in ordinary circumstances he may and ought to do this on some occasions in the way of giving effect to the judgment of the Church as not only an institution of Christ, but also a recognised institution of the country; and that in times of disorder, when he considers her to be departing from the truth, it is his duty to interpose for the purpose of asserting, defending, and promoting it. But the statement is carefully guarded by the reservation that this duty does not put him at liberty to interfere in

ordinary times with the action in their own department of the supreme ecclesiastical authorities.

The clearest and most significant discovery of the views of these men is made in the eighty-seventh and eighty-eighth propositions. In the eighty-seventh proposition it is stated that "as in the commonwealth so in the Church, the error of inferior judgments and assemblies, or their evil government, is to be corrected by superior judgments or assemblies, and so still by them of the same order, lest one order be confounded with another, or one government be intermingled with another government." "What shall now," the authors ask in the next sentence, "the adversaries of ecclesiastical power object here which those who admit not the yoke of the magistrate may not be ready in like manner to transfer against the civil judicatories and government of the commonwealth? seeing it happeneth sometimes that the commonwealth is no less ill governed than the Church."

The eighty-eighth proposition is in the following remarkable words:—"If any man shall prosecute the argument and say that yet no remedy is here showed which may be applied to the injustice or error of a national synod, surely he stumbleth against the same stone, seeing he weigheth not the matter with an equal balance; for the same may in like manner fall back and be cast upon Parliament, or any supreme senate of a commonwealth; for who seeth not the judgment of the supreme civil

senate to be nothing more infallible ; yea, also in matters of faith and ecclesiastical discipline, more apt and prone to error (as being less accustomed to sacred studies) than the judgment of the national synod? What medicines then, or what sovereign plaisters, shall be had which may be fit for the curing and healing of the errors and miscarriages of the supreme magistrates and senate? The very like, and beside all this, other and more effectual medicines, by which the errors of national synods may be healed, are possible to be had."[1]

Thus Gillespie and his supporters unquestionably held that the two powers must stand upon an equal footing, and that the Church possesses, by Divine authority, an absolutely distinct and co-ordinate jurisdiction. The leaders of the Disruption in 1843 considered the Westminster Confession as teaching the same doctrine.

The statement of the Second Book of Discipline on the subject of Non-intrusion was confirmed by the Assembly of 1638.

5. The Scriptural Foundation for the Views set forth at these successive Periods.

The fundamental question remains, What scriptural basis is there for the views of Melville and Gillespie, or for the declaration in the Westminster Confession? The argument on this part of the subject appears to me to lie in a nutshell.

[1] See Appendix, No. III.

Without discussing the application of particular texts, I may appeal to careful inquirers who compare our Lord's instructions to His Apostles and disciples with the history contained in the Book of Acts, and with the directions given in the Apostolic Epistles, to say whether the several companies of professedly converted persons in different places were not formed in the Apostolic age into special societies by Divine authority, and whether rules were not given for their guidance through an inspired voice. Even those who question the permanent obligation of the arrangements cannot deny that they were binding at the time under Apostolic direction. It may be said with truth that the promises of Christ involved the gift of inspiration and miraculous working for the first institution and order of a visible Church, or of visible Churches. But it must surely be admitted that, to some extent or in some sense, functions of ruling as well as of teaching were appointed to be exercised even by uninspired men in each visible Church as a distinct society governed by Christ's laws. I do not think it requisite here to touch the controversies between Independents and Presbyterians, and much less those between either and Episcopalians, in order to exhibit the certainty of this fundamental fact as one which cannot be disputed. The divinely authorised use of the pastoral office, and of baptism and the Lord's Supper in visible societies gathered together by Divine warrant, are

appointments of Apostolic order too manifest to require proof.

It is equally clear that these societies could not be justified in departing from Apostolic injunctions by the adverse action of the heathen governments in their localities. They were called to confess Christ in face of heathen opposition, and one mode of doing so was to abide by Christ's ordinances at all hazards. In temporal things they were commanded to obey the heathen magistrates, but in their ecclesiastical order they certainly had a distinct spiritual government.

Now, the question is, can any good reason be assigned for supposing that this state of relative obligation was in the slightest degree changed either by the cessation of Apostolic inspiration, or by a civil government becoming professedly Christian? In giving His commands for the formation of His Church or Churches, either with reference to bringing truly converted persons into spiritual fellowship, or with reference to the outward collecting of His professing people, Christ promised that He would support His servants in their obedience to Him, by His presence even to the end of the world. Whatever else this promise may involve, it assuredly implies that He had given commands regarding His Church or Churches which were of enduring obligation. Immediate inspiration may be withdrawn because superseded by the completion of an infallibly inspired Word, and the con-

version of nations and of civil rulers may oblige them to countenance and uphold the Church or Churches of Christ. But how can either of these circumstances alter the obligation resting on the Church or Churches to follow the commands of Christ set forth in that Word for the spiritual order of their arrangements? Or how can either circumstance warrant the interference of the most Christian government so as to come between the distinct society of a Church and its conscientious regard to the appointments of its Lord?

There is not a syllable in Scripture to indicate that any future profession of Christianity by the ruling power of a State could change the character of the distinct government appointed by the Lord Jesus in His Church. I am writing for Presbyterians, and therefore I do not think it necessary to prove that the divinely appointed government of the Church refers not only to the setting apart of pastors and the regulation of their duties (including the preaching of the Gospel and the administration of the sacraments), but to all arrangements for edification and order which can be carried out without assistance from secular power, and which would be attempted even at the risk of persecution from heathen rulers. Whether any particular species of arrangement or the exercise of any particular function belongs to the sphere of action thus regulated by Christ's authority, may be best judged of when we come to look in detail at the practical

applications of what I have called the old foundations. But that these foundations have good scriptural warrant can hardly be doubted by those who think that the directions and promises of Jesus, the narrative in the Book of Acts, and the Apostolic precepts, furnish materials for the permanent guidance of the Church.

These observations apply especially to the question of spiritual independence or co-ordinate jurisdiction, which, by the Free Church Formula is made an article of faith. But they also led a majority of the Church rulers in the years preceding the Disruption to the conclusion that no Church Court is warranted by Scripture in forcing a particular person as a pastor upon an unwilling congregation. The majority felt that they could conscientiously act under a law of Patronage that did not go beyond a right of nomination, however much some of them might disapprove of its existence. But they could not see their way to give effect to such nomination through the induction of a presentee in resistance to the conscientious mind of a protesting people. The principle of Non-intrusion was thus contended for as vital and essential, though not made an article of faith. Those who held it could remain in a Church with a majority against them, protesting against what they counted maladministration. But, as a majority, they felt obliged to act upon it.[1]

[1] Appendix, No. X.

CHAPTER II.

USE MADE OF THE OLD FOUNDATIONS IN SUPPORT OF FREE CHURCH VIEWS.

1. Interpretation of the Old Foundations by Free Churchmen.

The first judgment of the Court of Session adverse to the claims of the Church of Scotland was pronounced in the case of Auchterarder on the 8th of March, 1838. That judgment declared it to be illegal for a Presbytery to act on the principle of the Veto Law by rejecting a presentee to whom the majority of the male heads of families were opposed. But it did not directly in its terms assert for the Court a right of authoritative control over the ecclesiastical judicatories in the exercise of their functions, and was capable of being interpreted as leading only to the loss of civil possessions and emoluments. On this account the General Assembly did not assume, in the following May, that any interference had as yet occurred with their spiritual independence or their exclusive co-ordinate jurisdiction.[1] But they indicated their fear of such interference as the result of principles avowed by the majority of the Court, and as a natural inference

[1] Appendix, No. VIII.

from the judgment. Accordingly, on the motion of the late Dr. Robert Buchanan, of Glasgow, the Assembly agreed to a solemn declaration, in which, while acknowledging the exclusive jurisdiction of the Civil Courts in regard to the civil rights and emoluments secured by law to the Church, they asserted the distinctness of ecclesiastical government, in terms of the statement already quoted from the thirtieth chapter of the Westminster Confession. They asserted, also, the exclusiveness of ecclesiastical jurisdiction in all matters touching the doctrine, government, and discipline of the Church, as, in the terms of the Second Book of Discipline, flowing from God and the Mediator Jesus Christ, and being spiritual. They thus adopted and interpreted the old foundations derived from Scripture as clearly separating the obligation of submission to the civil power on questions directly relating to civil rights and emoluments, from the idea of obligation to follow the requirements of that power in the exercise of their ecclesiastical functions. They announced their adherence to the old principle, that the rulers of Christ's Church are bound, in conscience, when endeavouring to carry out the ecclesiastical government which He has appointed in their hands, distinct from the civil magistrate, to listen to no other voice except His own, speaking to them in His Word, through the scriptural order of that government.

It has been already shown that the same old principle

was strikingly expressed by Gillespie and Baillie in their communication to the General Assembly in 1647, as leading to an absolute equality and co-ordination of authority in cases of collision, which could not be corrected or modified by the admission of any one super-eminent earthly rectifier. In harmony with this conclusion, we find, in December, 1838, Dr. Charles John Brown, with concurrence of the leading Non-intrusionists, declaring that "whensoever the question arises, What is spiritual and what is civil?—what belongs to the sphere of the Church and what to the sphere of the State?—the Church may not acknowledge any civil tribunal as the judge of that question—that this conclusion is clearly and undeniably involved in the principle of a co-ordinate and independent Church government;" and "that it is to give up the whole question," and "to resign the whole government of the Church into the hands of the State," to "acknowledge even the State itself as the arbiter of the question, What is spiritual?" We find him adding these pointed words: "Of course, the State, upon the other hand, is not bound to acknowledge the Church as arbiter. But there is an Arbiter above them both."[1] Such explanations of Free Church principle are very startling to most statesmen and lawyers. But they are the true interpretation of our old foundations, and spring

[1] Report of meeting in Music Hall, Edinburgh, December, 1838; and Appendix, Nos. III., IV., and IX.

inevitably from the scriptural principle of an absolute obligation resting on the Church to follow her own conscientious judgment of what is for the glory of her King and Head in the distinct government appointed by Himself. They shut out, of course, the idea of the obligation being capable of modification by any question of compact or contract.

The language of Dr. Chalmers in the General Assembly of 1839, immediately after the confirmation by the House of Lords of the Court of Session's judgment, involves the same view with that taken by Dr. Brown. In answer to the charge of priestly ambition, similar to that of the Popish clergy, he said: "What is the civil and what is the ecclesiastical in the present question? The temporalities of the living belong, beyond all question, to the civil category. Do we offer any resistance to the sentence which strips us of these?" "We refrain from ought which touches their department; and all we ask is, that they shall alike refrain from ought which touches upon ours. After the sentence they have given forth, we are not asking at their hand the temporalities of the benefice of Auchterarder; but they are requiring at ours that we shall ordain for that benefice a man on whom, by the laws of the Church and in our views of what is best for the good of Christianity, we must refuse to confer that privilege." "Which of the two parties is it that makes an encroachment on the domain of the other?"

In some Remarks, in 1839, upon the Dean of Faculty's letter to the Lord Chancellor, the late Dr. Candlish speaks of a contract between the State and the Church. But it may be seen that he did not mean a contract in the legal sense, which may be enforced by a court, but simply an alliance from which either party may break off. He says that "when any question arises as to the conditions of the alliance, it is a question between equals, in the adjustment of which the Church must be recognised as a party to a contract, fairly interpreting its terms according to her best understanding of them, and entitled in a dispute to confer with the other party on a footing of independence and equality."[1]

The above are sufficient specimens of interpretations in the earlier period of the conflict which preceded the Disruption. The intimations during the final period of that conflict are equally explicit. In the Commission of Assembly, on the 31st of January, 1843, Dr. Candlish said: "Whoever may put forth this monstrous claim to be sole judge of what is spiritual and civil tramples underfoot the rights, civil and spiritual, of all mankind." "If this claim be put forth by a Church, it follows that that Church is dragging under her superintendence all ecclesiastical persons, and assuming an authority in all causes." "If this amounts to a violation of civil liberty when the claim is put forth by a court of Christ, is it

[1] Appendix, Nos. III. and IV.

less a violation when put forth by a Court of Session ?" At a later period of the discussion, on the same day, Dr. Candlish stated his meaning to be that no mere Non-intrusion or Anti-patronage measure could now put the Church right, unless at the same time there was secured to the Church a jurisdiction to this extent, that the Church should be fully entitled to determine for herself, and for the guidance of her own conduct in spiritual matters, what falls under her spiritual jurisdiction ; leaving the Court of Session to determine for itself, and for its own guidance, what falls within its civil jurisdiction. On the 10th of March, 1843, Dr. Chalmers said that nothing would satisfy short of this, that adverse civil sentences shall have no other effect than the forfeiture of what the State gives, and that they shall not invest the Civil Courts with the power of delivering mandates to hinder and interdict the Church in the discharge of any ecclesiastical duty. Similar views were expressed by Dr. Gordon, Dr. Cunningham, and others.

The eminent men now referred to distinguished clearly between an adoption and interpretation of the declarations in the sixteenth and seventeenth centuries on the subject of the relative positions assigned by the Word of God to civil and ecclesiastical powers, and an agreement with what was held in those times as to the principle of coercion by the civil power for the promotion of truth in religion. Maintaining to the full extent the principle

of religious liberty, they assumed that the civil power was not entitled to advance the cause of the Gospel or the views of the Church, except by giving countenance and support according to its best judgment, and by upholding such an outward order as would facilitate the observance of divine laws and ordinances. They contended, therefore, that the only legitimate resource in the hand of the State for meeting unreasonable action by the Church was the withdrawal of the outward benefits and privileges bestowed by the State.

Although the line of right action for the State is closely affected by their opinions, the main question involved in those opinions is the question as to the right and duty of the Church to resist authoritative control by the civil power in the exercise of the ecclesiastical functions which she believes to have been assigned to her by her Divine Head. The Free Church holds that there is no room for compromise in so sacred a matter.

I have already anticipated any question as to the scriptural grounds upon which the Non-intrusion party proceeded with respect to the calling and settlement of ministers.

2. Application of the Old Foundations to Particular Cases before the Disruption.

Every candid inquirer will acknowledge that, whether the conclusions brought out in the previous sections be

well founded or not, they cannot be matters of mere expediency for those who acquiesce in them. They involve doctrine, and affect conscientious belief. They imply an obligation to act upon them at all hazards, without regard to the authority of any power on earth. Forgetfulness of this fact lies at the root of much misunderstanding. A great part of hostile criticism regarding the Free Church position would be disarmed were the fundamental character of the obligation which we feel duly considered. It is in this light that, in all fairness, the action of the Church Courts after the first judgment of the Court of Session in the Auchterarder case ought to be contemplated.

The first practical step in the conflict of jurisdictions took place in the case of Mr. Andrew Kessen's presentation to the parishes of Kinloch and Lethendy. At the instance of Mr. Thomas Clarke, previously rejected as assistant and successor under the Veto Law, an interdict from the Court of Session, against the Presbytery of Dunkeld proceeding upon that presentation, reached their moderator on the 18th of August, 1837. Before this date, the Presbytery had not only sustained the presentation, but had moderated in a call to Mr. Kessen, and had sustained it. In these circumstances, they considered that their scriptural obligations required them to look at no other question except the purely ecclesiastical one, whether Mr. Kessen was qualified to be ordained or not.

They believed that, whatever might be determined as to the civil rights or emoluments in connection with the benefice, the call of a person to be their pastor by the people, under Presbyterial guidance, was an imperative reason for his induction to the spiritual office, if he were found qualified. They thought that they were bound in conscience to maintain their spiritual independence by proceeding immediately with Mr. Kessen's trials. And they intimated to the Court of Session that they respectfully declined the jurisdiction of their Lordships in a question entirely of an ecclesiastical nature. They assumed, in harmony with the old foundations of Free Church principle, that the whole legitimate procedure of a Presbytery, after the sustaining of a call, is in the exercise of functions which Christ has assigned to His Church, and which, by His authority, are free from secular control. They were thus claiming no civil rights, nor assuming any power to confer them, and were therefore ready to disregard any question of civil right which might arise out of their line of action in what they looked upon as their exclusive sphere.[1] They were persuaded, at the same time, that the exclusiveness of this sphere had been sanctioned by the constitution of the country.

In the course of subsequent proceedings, and after the judgment of the Court of Session in the Auchterarder case, the Commission of Assembly found that admission

[1] Appendix, No. VIII.

to the pastoral charge of a parish and congregation is entirely an ecclesiastical act, subject to the jurisdiction of the ecclesiastical courts, and declared it to be the duty of the Presbytery of Dunkeld to carry out this finding by the performance of what the Commission had determined to be a purely spiritual act, and in regard to which the Civil Courts could possess no authority. In obedience to these instructions, the Presbytery, on the 21st of August, 1838, inducted Mr. Kessen to the pastoral charge, in face of an interdict from the Court of Session against their doing so. They held, on the one hand, that this line of action was required by their allegiance to Christ as Head and King of the Church, and by their ordination vows. They believed, on the other hand, in accordance with a principle of Scottish law, thought to have been laid down in the previous century, that no other adverse result could legitimately follow from their disregarding the supposed civil rights of Mr. Clarke, except the forfeiture by Mr. Kessen and the Church of the temporal advantages attached by the State to the office of parish minister in Kinloch and Lethendy. The Presbytery and Mr. Kessen were willing to encounter that forfeiture for the sake of their ecclesiastical principles. Claiming neither civil right, nor the power of conferring it, they did not think that any question of such right was competently involved in their procedure.

The ground taken by them is illustrated, while the

whole character of the Free Church position is brought out by the resolution of the General Assembly in May, 1839, with respect to the judgment of the House of Lords, affirming that of the Court of Session in the Auchterarder case. It was a twofold conviction that directed the action of that Assembly. Conscientious regard to views of scriptural obligation would not have sufficed. If these had stood alone, their only legitimate issue would have been an immediate abandonment of the Establishment by the Non-intrusion party. But that party were also convinced that the constitution of the country had furnished protection for their conceptions of scriptural principle, and had given to the General Assembly a thoroughly co-ordinate jurisdiction, with which no Civil Court, and not even the House of Lords could interfere. They were consequently persuaded that they were called upon to defend and exercise that co-ordinate jurisdiction, until it should be set aside in some more decisive manner than by a simple judgment of the very courts whose interference they believed it was intended to prevent. I say nothing here as to the validity of the grounds on which this persuasion was based. They will afterwards be fully considered. But I wish to fix attention on the sense of twofold obligation which influenced the Non-intrusion party. One aspect of their position obliged them to disregard the judgment of the Civil Courts. Another

aspect of it obliged them to remain in the Establishment.

They did not disregard the judgment of the Civil Courts in all respects. On the contrary, the General Assembly of 1839, on the motion of Dr. Chalmers, instructed the Presbytery of Auchterarder to offer no further resistance to the claims of Mr. Young (the presentee) or of the patron, to the emoluments of the benefice of Auchterarder, and to refrain from claiming the *jus devolutum* (that is, the right of presentation belonging by law to the Presbytery, when six months have elapsed from the vacancy without a valid presentation), or any other right or privilege connected with the said benefice. But they resolved at the same time that the principle of Non-intrusion—the principle of the Veto Law—could not be abandoned, and that neither in the case of Auchterarder nor in any other case would they allow a presentee to be settled as pastor in a parish contrary to the will of the congregation. The concluding part of the resolution assumes that, in consequence of the judgment in the Auchterarder case, the legal provision for the sustentation of the ministry would be suspended in every instance in which it was found requisite to carry the principle of Non-intrusion into practical effect, and treats the importance of appointing a committee, and the desirableness of conferring with Government as arising entirely from that circumstance.[1]

[1] Appendix, No. II.

The hostile criticisms upon this resolution imply a repudiation, both of the old foundations in scriptural principle, and of the conceptions regarding the constitution of the country, out of which it sprung.

Its first paragraph indicating submission to the Civil Court with respect to civil rights and emoluments, and instructing the Presbytery of Auchterarder to that effect, has been represented as a mere *pretext*, and as inconsistent with its second paragraph in which the determination to adhere to the principle of the Veto Law is announced. But no one will see pretext or inconsistency in it, who reads it in the light of the view taken by its authors of scriptural principle and constitutional arrangement. They did not propose to take credit by it for any special generosity, or for a spirit of concession. They simply, by means of it, drew the line between what they believed to belong to the jurisdiction of the Civil Court and what they claimed as belonging entirely to their own scriptural and constitutional jurisdiction. They knew that whatever course they might take, the force of law would oblige them to yield to its commands on the subjects of the benefice and the *jus devolutum*. Still, when they felt themselves compelled by conscience to come into collision with the meaning of a civil judgment, in so far as their ecclesiastical action was concerned, it was fitting that they should expressly disclaim the intention of further disputing the validity of it in its application to

temporal matters, or of exhibiting a rebellious spirit against it in that respect.

It has been insinuated that, as trustees of the Widows' Fund, persons representing the Church intended to dispute the right of the patron or presentee to the stipend of Auchterarder, so that the disclaimer in the resolution was not genuine. Those trustees were a limited body, constituted and bound by an Act of Parliament. They could not avoid acting according to such legal advice as might be given to them. But the Assembly saw nothing to prevent the Civil Court from finding that, when the vacancy in the parish was continued through illegal proceedings, the Act in favour of the Widows' Fund did not apply. The disclaimer in 1839 indicated that such a finding would be submissively acquiesced in.

It is said, however, that to persist in maintaining the principle of the Veto Law, was to persist in an attempt to defeat the civil rights of the patron and the presentee. The Legislature had certainly connected the full effect of these civil rights with the exercise of ecclesiastical functions by the Church. But if the view taken by the Church of these functions, as flowing directly from the appointment of Christ, in accordance with the old foundations, be correct, then the Church, in the exercise of them, had nothing to do with the question of what civil rights or advantages might or might not follow; but had simply to consider what was for the honour of Christ and

the edification of His people. In that exercise they felt they must listen only to the voice of Christ, their Head and King, and not to the voice of any Civil Court. They were persuaded, also, that their liberty to act on this principle was protected by the constitution of the country. Such was their rule of action in the case of Lethendy. Such, also, was their rule of action in the Assembly of 1839 with reference to the case of Auchterarder.[1]

They took steps for conferring with Government as to a remedy for the collision of jurisdictions, which they held to have occurred. They did not at this stage propose to approach Government or Parliament on the subject of "Spiritual Independence." They did not think that the judgment in the Auchterarder case could legitimately deprive them of their exclusive jurisdiction in ecclesiastical matters; but they knew that in every case to which it applied, it would deprive their ministers and congregations of the civil advantages bestowed by an establishment. They saw that the continuance of such a state of things would soon render the position of an Established Church of no value to them, and consequently lead practically to a disruption, and therefore they set themselves to see whether some practical measure in favour of Non-intrusion might not be obtained. It appeared to them that by a speedy interposition of the Legislature in that direction, further collision with the

[1] Appendix, No. IV.

Civil Court might be prevented, and that an adjustment might be arrived at without compromise of the spiritual independence which they claimed and could not surrender.[1]

It is unnecessary for me to go into particulars of the action of the Commission of Assembly in carrying out the resolution of 1839 with respect to the case of Marnoch, in the Presbytery of Strathbogie. That action stands on the same footing with the resolution itself. It resisted the intrusion of Mr. Edwards into the pastorate of Marnoch at the bidding of the Court of Session. It vindicated the doctrine of an absolute spiritual independence in the exercise of ecclesiastical functions, without regard to any civil question that might consequently arise. But it involved a careful abstinence from any attempt to dispute or interfere with the judgment of the Civil Court regarding such civil questions.

The Assembly and its Commission persevered, at every hazard, in giving effect to the same principle, and in drawing the same distinction with respect to all other cases which arose. In that of Culsalmond, they refused to recognise the intrusion of a presentee, and appointed another person to officiate for the congregation in face of an interdict from the Court of Session. While asserting their spiritual independence, they thereby supported the spiritual liberties of congregations who stood by them amid difficulties and persecutions to the last, and who associated

[1] Appendix, No. II.

themselves aferwards with the Free Church of Scotland. The presentees gained nothing, except the manses and stipends; the people chose other pastors for themselves.[1]

The Church regarded the assignment of districts for spiritual work to particular pastors, the constitution of kirk-sessions, and the admission of pastors and elders to seats in Presbyteries, as matters clearly associated with the functions of ecclesiastical government assigned to her by Christ. It appeared to her that neither in the Apostolic age nor in these modern times could the Church fulfil her appointed part in pursuing her Master's will without dealing freely with such matters. Therefore, she believed that the power of constituting new parishes and kirk-sessions *quoad sacra,* and appointing pastors and elders therein, with all usual privileges and duties, formed an essential portion of her ecclesiastical jurisdiction. She did not believe that the exercise of this power could interfere with civil rights, either directly or indirectly. But, on the ground of the fundamental principles already stated, she held that her allegiance to Christ prevented her from being diverted from the course she judged most expedient in disposing of questions on the subjects referred to, by any consideration of how civil rights, real or imaginary, might be thereby affected. She considered that, if the State desired to effect civil

[1] Appendix, No. VIII.

purposes in connection with parishes or their divisions, or if the Civil Court thought it needful to take steps for securing the accomplishment of such purposes, some different course must be taken from that of coercing or prohibiting the movements of ecclesiastical courts in their endeavours to extend the pastoral and presbyterial influence of the Church *in the manner which they thought best for their Master's cause.* Therefore, the Assembly and its Commission resisted interdicts from the Court of Session prohibiting the ministers and elders of *quoad sacra* charges from sitting in the Church Courts. In particular, in the Stewarton case, they resisted an interdict against the institution of a *quoad sacra* charge and the assignment of a district and kirk-session to a pastor, with seats in the Presbytery for himself and a ruling elder. They also, in the Cambusnethan case, proceeded to depose a minister found guilty of theft, although the Court of Session had interdicted them from doing so, on the ground that ministers of *quoad sacra* parishes had sat and voted in the Presbytery. They did the same in the case of a minister found guilty of drunkenness.

No impartial person can fail to see that, on the supposition of their principles of action, conscientiously based on Scripture, being well founded, they could not have done otherwise; and that, while they believed their co-ordinate jurisdiction to be sanctioned by the national constitution,

they were not called upon to abandon the Establishment. Nor can any other judgment be fairly pronounced upon what have been considered as their harshest and most extravagant proceedings. I refer to those adopted with respect to probationers and ministers who resisted their authority, and especially to those in the case of seven ministers, members of the Presbytery of Strathbogie.

The resolution of the General Assembly of 1838, asserting the scriptural principle of spiritual independence, and intimating a solemn determination to defend it at all hazards, was concluded by a declaration that the Assembly would "firmly enforce obedience upon all office-bearers and members of the Church, by the execution of her laws, in the exercise of the ecclesiastical authority wherewith they are invested." Careful consideration will show that the course thus given notice of was essential to the integrity of the ground taken up in the resolution. No jurisdiction can be upheld which is not enforced where enforcement is necessary. But did the Church before the Disruption proceed in a precipitate manner, to deal with the resistance given to her authority by probationers and ministers under cover of weapons obtained from the armoury of the Civil Courts? Far from it. The Commission of Assembly indeed, when instructing the Presbytery of Dunkeld to proceed with Mr. Kesson's ordination to the pastoral charge of Kinloch and Lethendy, did at the same time direct that,

unless Mr. Clarke should withdraw his civil process, the Presbytery should serve him with a libel. It was consistently held that for a probationer to endeavour, by civil process, to prevent a Presbytery from exercising its ecclesiastical functions, was a grave ecclesiastical offence, and called for the exercise of discipline. But full opportunity was given to Mr. Clarke to depart from his unscriptural and unpresbyterian line of conduct. Though he continued to pursue that line, and in an aggravated form, for more than three years after August, 1838, he was not deprived of his license till May, 1842. In every case much forbearance was shown. But the Church did not fail in the end to vindicate her discipline, when either a minister or a probationer had sought for the interference of the Civil Court in order to arrest or enjoin ecclesiastical procedure.

The chief instance of such vindication was that in which, after long-protracted and patient dealing, seven ministers, members of the Presbytery of Strathbogie, were deposed from the ministry. It is easy to represent to the present generation this deposition as if it were a rash and intolerant piece of ecclesiastical tyranny in a time of excitement. But let the records of the transactions relating to it be candidly examined, and it will be seen that it was a judgment painfully forced upon the Church after great forbearance upon her part. I say, *forced* upon the Church, because the course taken by these seven

men, under the pressure of legal advice, was fitted to put to the test the question whether the Church were really in earnest about the high scriptural ground which she took upon the question of spiritual independence. If that high ground were indeed good, then the action of these men left her no alternative. They were not deposed for obeying the Civil Court. The charge against them was, that they had of their own accord exercised their ministry in face of their suspension by the Assembly, and that they had, also of their own accord, petitioned the Court of Session to reverse the sentence of suspension, to interdict and coerce the action of the ecclesiastical courts, and to do so even throughout a whole district of country, with respect to the preaching of the Gospel on the part of ministers sent by the Church authorities. If this kind of insubordination were to be submitted to, it would have been vain for the Church to speak about her independent jurisdiction. And, therefore, to use the language of Dr. Cunningham, in accordance with what I have shown to be the foundations of Free Church principle, they were deposed, because they had broken the laws of the Church, because they had broken their ordination vows, and because they had sinned against the Lord Jesus Christ.

In moving the sentence of deposition, Dr. Chalmers said:—"The Church of Scotland can never give way, and will sooner give up her existence as a National Estab-

lishment than give up her powers as a self-acting and self-regulating body, to do what, in her judgment, is best for the honour of the Redeemer and the interest of His kingdom upon earth. We see no other alternative. As these men do not humble themselves, their deposition is inevitable. The Church of Scotland cannot tolerate, and, what is more, it could not survive the scandal of quietly putting up with a delinquency so enormous as that into which those brethren have fallen." This was not the hasty conclusion of people stimulated by a sudden emergency, but the deliberate judgment of those who had been anxiously pondering and watching the case for a year and a-half. The principle at the foundation of this judgment is an essential principle of the Free Church, from which she cannot consistently depart.[1]

3. Applications of the Old Foundations to Particular Matters after the Disruption.

The first application of the old foundations after the Disruption occurred in the year 1845. Mr. Waddel, minister of the Free Church at Burrelton, was accused of drunkenness. Letters in his name were written to witnesses in the case, threatening them with prosecution in the Civil Court if they gave their evidence to the Presbytery. He was consequently summoned to the bar of the General Assembly in May of that year. He

[1] Appendix, No. VIII.

appeared, and expressed his deep regret that he had authorised the letters to be written so as to arrest the investigation of the case. He said, also, that he was ready to express, in the strongest terms, the opinion that the Civil Court had no right to interfere with ecclesiastical jurisdiction. But the Assembly, regarding the offence as in substance the same with that of the seven ministers of Strathbogie, suspended him from his functions for six months, and instructed the Presbytery to proceed with their investigation of the charge of intemperance. The Assembly did not consider his statement on the fundamental question of spiritual independence as explicit enough, and they felt it needful to mark their sense of the serious guilt attaching to his conduct. At the meeting of Assembly at Inverness in the ensuing month of August, it was found that he had agreed to resume his labours in face of the suspension, and that he and his elders and deacons had renounced connection with the Free Church. It was also intimated that his agent had again sent letters to the parties cited as witnesses, threatening them with prosecution. The Assembly cited Mr. Waddel to the Commission in November, to answer for his offence, now greatly aggravated by his departure from previous assurances. He did not appear before the Commission, who pronounced upon him, in his absence, the sentence of deposition.

The second instance of action by the Free Church in

the same line was the adoption, in 1846, of an amended series of questions, to be put to persons before ordination and admission as ministers, elders, or deacons, or before receiving license to preach the Gospel, with a corresponding formula to be subscribed. These questions and the formula had been proposed in 1844, but were not finally adjusted till 1846. The formula refers to the questions as having been previously answered. The fourth question is as follows:—

"Do you believe that the Lord Jesus Christ, as King and Head of the Church, has therein appointed a government in the hands of Church-officers distinct from and not subordinate in its own province to civil government, and that the civil magistrate does not possess jurisdiction or authoritative control over the regulation of the affairs of Christ's Church? and do you approve of the general principles embodied in the Claim, Declaration, and Protest adopted by the General Assembly of the Church of Scotland in 1842, and in the Protest of ministers and elders, commissioners from Presbyteries to the General Assembly, read in presence of the Royal Commissioner on 18th May, 1843, as declaring the views, which are sanctioned by the Word of God and the standards of this Church, with respect to the spirituality and freedom of the Church of Christ, and her subjection to Him as her only Head, and to His Word as her only standard?"[1]

[1] Appendix, No. II.

An affirmative answer to this question carries, and was intended to carry with it a declaration of concurrence in the views of Andrew Melville and the Second Book of Discipline, and in the interpretation which the Church in the Disruption struggle had put upon the statement in the first paragraph of the thirtieth chapter of the Confession of Faith. The general principles embodied in the Claim of Right and in the Protest of 1843, as to the spirituality and freedom of Christ's Church, and her subjection to Christ and His Word, are unmistakably those exhibited in what I have called the old foundations. They are the principles which ruled the action of the Church in the cases of Auchterarder, Lethendy, Marnoch, Culsalmond, and Stewarton. They necessitated and accomplished the deposition of the seven Strathbogie ministers. They also led to the deposition of Mr. Waddel. All office-bearers and probationers of the Free Church are now brought under a sacred obligation to adhere to them by the answer to this question, and by subscription of the corresponding formula.[1]

Ever since May 1843, the Free Church of Scotland has steadfastly adhered to these principles, and has never been diverted from acting in accordance with them in all the parts of her diversified administration and legislation.

[1] I may add that both in the questions and in the formula the word *Erastian* was substituted for the word *Bourignion*, as describing a well-known class of errors in place of an obscure and forgotten one.

She has felt that the chief human bulwark of her spiritual independence lay in her own faithfulness, and not in the countenance or protection of the civil power. But she has never ceased to assert the duty of the civil power not only to recognise and countenance the Church of Christ, but to protect her spiritual independence.

The third specific occasion for the manifestation of her adherence to her Disruption ground arose through the resistance given to her ecclesiastical authority by Mr. Macmillan, minister at Cardross. The Free General Assembly of 1858 found him guilty of intemperance, and suspended him from the functions of the ministry, separating him at the same time from his pastoral charge at Cardross. In place of submitting, he applied to the Court of Session for an interdict against the execution or intimation of the sentence. The application was refused by the Lord Ordinary (Lord Kinloch). The attention of the Assembly having been called to the terms of it, Mr. Macmillan was summoned to the bar of the Assembly to explain the connection of his name with it. When he appeared, he was asked whether or not it had been made at his instance and by his authority—yea or nay? The answer was, "Yea." The Assembly refused to hear any further statement from Mr. Macmillan, but immediately pronounced upon him the sentence of deposition.

This, as well as every other sentence of deposition by the Assembly, whether before or after the Disruption,

was preceded by special prayer, and was solemnly declared to be "in the name of the Lord Jesus Christ, the sole Head and King of this Church, and by virtue of the power and authority committed by Him to it." I think it of material consequence to notice here that the ecclesiastical effect of the Assembly's action was not in the slightest degree arrested by subsequent contentions in the Court of Session, or by any finding of that Court. The Free Presbytery of Dumbarton fulfilled the instructions given to them, and the pastoral charge of Cardross was filled up in due course of ecclesiastical law. The Church never swerved in the slightest degree from her independent line of obedience to what she believed to be the mind of her Lord and Master. However much harassed by the extent to which Mr. Macmillan was advised to carry his rebellion against her discipline, and by what she counted the fallacious conclusions of the civil judges, she did not permit either the one or the other to hinder or modify her exercise of her exclusive jurisdiction in the ecclesiastical affairs of her congregation at Cardross. She kept by her own principle and her old foundations at all hazards; and if the case in the Court of Session had terminated in an endeavour to coerce her either by the force of damages or in any other way, she would not have yielded, but would have treated the endeavour as persecution, to be met not by concession, but by patient endurance for her Master's sake. The

deposition of Mr. Macmillan took full effect, and never was or could be overthrown. [1]

It became needful, however, for the Free Church of Scotland to maintain her spiritual independence on the old foundations, not only in the direct exercise of it, but in argument and pleas for its protection before the Court of Session. Actions at law, raised by Mr. Macmillan, demanded both a large sum of damages from individual members of the Free Church Assembly, and also a reduction of its sentences of suspension and deposition, and a smaller sum of damages from it, by way of *solatium*, for the alleged injury already done. The first practical petition in carrying out these actions was for an order requiring those representing the Assembly to produce certain documents needful in the case. The Court were thus asked to appoint the Free Church to bring her spiritual sentences under its judgment. Now, if the actions had simply been to enable Mr. Macmillan to retain his manse, and to obtain his dividend from the Sustentation Fund, the Church would have raised no objection to allowing her sentences to be judged of, in relation to these purposes. For she had nothing to conceal, and such an action, however unjust or untenable, would not have been an attack upon the distinct ecclesiastical government assigned to her by her Lord. She would have had good pleas against it, if a right opportunity had occurred for urging them. But such opportunity did not

[1] Appendix, No. II.

occur, because the demand for *reducing* the sentences, and for damages on account of the sentences, *without allegation of malice*, raised a far more important question. She never objected, or can object, to the Civil Court looking into all her acts, and all the grounds of them, with a view to determining rights of property, and adjusting pecuniary interests.[1] But the reducing of her sentences seemed, in her view, unnecessary for any civil purpose, and to involve the idea of a right to coerce her into a departure from them; and she thought that this idea was confirmed by a demand for damages, simply on account of them. Therefore, she objected to an order upon her for bringing her sentences before the Court, because she objected to the first step in actions for reducing her sentences and for corresponding damages. She objected to any progress being allowed in what she represented as an incompetent proceeding. The Lord Ordinary (Lord Benholme) decided in her favour on this point, and thereby dismissed the actions.

The judges of the First Division of the Court reversed Lord Benholme's decision, on the ground that, whatever might be the value of the pleas for the Church, it was needful, in order to estimate them, that the Court should examine the sentences. They intimated at the same time that these pleas were entirely reserved for subsequent consideration. Though contending that the very nature of a demand for reduction of ecclesiastical

[1] Appendix, No. II.

sentences ought to have superseded such a course, the Church saw no surrender of her claims, in submission to a judgment which left her pleas untouched. She therefore acquiesced on this footing.[1]

The Court afterwards repelled the defence of the Church, in so far as it rested on the ground of the sentences being spiritual in the course of discipline, and not relating to civil rights; reserving the specific pleas, the force of which depended upon inquiry into the particular Constitution of the Free Church, and the engagements of its members and ministers. The Free Church resisted the application of this view at each step in the process which the legal forms allowed, and which gave opportunity for the arguments of her counsel, and did her best in her own courts and at public meetings to exhibit to her people the encroachment upon the liberty given by Christ to His Church that was involved in the assumption of power to reduce ecclesiastical sentences. She did not think for a moment of submitting to the encroachment. But she resolved to defer asking leave to appeal to the House of Lords, until the case should have reached a more advanced stage.[1] It is true that all the judges intimated that they did not entertain the conception of compelling the Church to reinstate Mr. Macmillan in his ministerial functions, and that they looked upon the reduction they contemplated simply as a means of putting the sentences out of the way, so as to leave

[1] Appendix, No. II.

room for his retention of civil rights or his recovery of damages. But the Church had previous experience in the Auchterarder case, to impress her with the persuasion that such reservations in the speeches of judges might not prevent the reducing of the sentences from being afterwards made use of to support processes of coercion. We held besides, that damages not for the malicious conduct of individuals, but for the judicial procedure of an ecclesiastical court in the *bonâ-fide* and conscientious discharge of its functions would be equivalent to a coercive interference, which our fundamental principles must oblige us to resist and protest against by every available means. We would readily have gone before a jury to defend all our acts, if the only thing avowedly aimed at had been the retention, by Mr. Macmillan, of some civil possession. But no judgment, even of the House of Lords, would have induced us to follow him to a jury when his aim was the reduction of our spiritual sentences, so as to be reponed in his ministry.

The Court, however, after more careful and exact consideration of the circumstances before them, came of their own accord to a conclusion, by a majority, which saved us from such questions, and which also saved themselves from appeals to the House of Lords against their former judgments. They found that an action of damages could not lie against a body like the General Assembly collectively; that no civil right could be established against it;

and that, consequently, the reduction of the sentences being competent only as leading to damages or the maintenance of civil rights, was not competent where these matters were excluded. They, at the same time, indicated that an action of damages against individual members of Assembly might not be competent without an allegation of malice. Lord Deas dissented from these conclusions. But, by the decision of the Court, the actions were dismissed, and it thus became unreasonable, and to no purpose, for the Church to appeal against the former judgments. The House of Lords could not be expected to entertain an appeal which had no practical bearing. Her sentences remained unaffected by what had occurred, and she was left free to pursue her own way without let or hindrance. Writers opposed to the Free Church cause have contrived to hide from themselves and others this peculiar and instructive termination of the Cardross case. But a clear understanding of it proves that, so far from having to surrender her ground, she was enabled to maintain it all the more firmly through the instrumentality of the ultimate issue.[1]

It is true that, in the imagination of those writers, another action has been most unreasonably mixed up with the dismissed ones, so as to confuse people's minds about the result. Guided by the hint given from the Bench, Mr. Macmillan was advised to raise a new process, in which he demanded damages against particular members of what he

[1] Appendix, No. II.

called the Free Church Association, with an allegation of malice. It was perfectly consistent both with the old foundations and with the recent assertion of Free Church principle for the persons, against whom the new process with an allegation of malice was directed, to meet it by an adjustment of issues to be judged of by a jury. It was not likely that a jury would have given a verdict in favour of Mr. Macmillan. At an early stage of the process, however, he withdrew from the prosecution of it. It is said that he did so from want of funds. There certainly was no motive to induce the opponents of Free Church principles to help him at this stage, when they found that the Free Church no longer considered those principles to be involved in his efforts. But, whatever was the cause of the collapse in his final movement, the Free Church of Scotland came out of the protracted disturbance occasioned by his conduct without having conceded an inch of her ground, and having practically gained a victory. I shall speak in a subsequent chapter of the legal position in which the disturbance left her.[1]

Between the termination of the Cardross case and the change in the law of Patronage effected in 1874 no special occasion arose for ecclesiastical action in maintaining spiritual independence, except in so far as the negotiations for Union with the United Presbyterian Church led to some expositions of it.[1] The expositions

[1] Appendix, No. II.

were due to two circumstances occurring in the course of those negotiations. One of these was what appeared to be a fallacious and dangerous view, indicated by individual opponents of the Union—a view which tended to identify spiritual independence with the protection for it that we claimed from the State. Such a view was thought to nullify the truth, that it is a gift bestowed by Christ upon His Church, which she is called upon to hold fast and exercise, whether she be established or disestablished. The attempt to vindicate this truth was in entire harmony with our previous contentions and with the old foundations. Temporary excitement led some persons to imagine that it was made in the interests of the Union. It was really the result of a wholesome jealousy lest a fundamental principle should be overshadowed or undermined, and would have been made in opposition to the view referred to, if no proposal for Union had ever been heard of.[1]

The other circumstance that brought the subject into prominent notice was the appearance of a threat with reference to Free Church property, as if the fear of losing any of it should deter us from prosecuting the union. The subject of property, or the retention or loss of it, had been spoken of by the Union Committee only in the light of a secondary question, which, in the event of a favourable issue to the consideration of the primary one that bore on spiritual relations, would call for reasonable attention. It was in this light that the same subject

[1] Appendix, No. II.

was looked at, and by consent of all parties, previously to the recent union with the Reformed Presbyterians. No person maintained that, if a union were formed in resistance to the protest of a minority, there would be the smallest interference with spiritual independence, in applications to the Civil Court by that minority for the possession of property. But the opinion was indignantly expressed that, to bring the risk to property to tell upon the decision of the question of Union, in its relation to our ecclesiastical discussions, was inconsistent with the principle of spiritual independence, and seriously affected its integrity. For any argument of that kind seemed to partake of the same unscriptural aspect, which marked the conduct of the Strathbogie ministers and of Mr. Macmillan. But it never has been contended by any party in the Free Assembly that the principle of spiritual independence would justify a majority in making such changes as would destroy the identity of the Church. We cannot admit, indeed, that any conception of contract, or even brotherly covenant, should prevent us from following the course which we think conformable to the mind of Christ. But we may fairly admit that, if that course went so far as, in our own view, to involve a clear departure from old foundations against the protest of a minority, we could not feel warranted in continuing to assume the name and position of the original Church.[1]

On the other hand, there is no ground for the impu-

[1] Appendix, No. II.

tation that we receded in the slightest measure from the strictest maintenance of our ground, when, in 1873, we agreed to suspend the negotiations for Union with the United Presbyterian Church. It is true that we held the prosecution of that Union to be matter of scriptural obligation, and that we thought the Church failed to fulfil such obligation when she failed to carry out what was aimed at. But the very nature of Church Union as an object is sufficient to show the harmony between our sense of duty and our procedure in 1873. Scriptural declarations are as much against the breaking up of Union, as they are in favour of forming a Union. We saw that the division of opinion in 1873 was too great in our Church, to warrant our breaking up an existing Union for the sake of forming a new one. We had all along declared that we did not think the question one to be settled by a mere majority. We simply gave effect to that declaration in 1873. The main responsibility thus rested on the minority. The subject of the risk to property never would have prevented the Union, if our footing had been otherwise clear. If we had allowed such risk to regulate our conduct, I admit that our course would have involved an abandonment of our fundamental principle. But we were moved by the aspect of the case in its spiritual relations, and not by temporal interests. We adhered to our Disruption foundations in their full significancy.[1]

[1] Appendix, No. II.

CHAPTER III.

RELATION OF THE OLD FOUNDATIONS TO THE ORDER AND HARMONY OF NATIONAL LAW AND JUSTICE.

1. Their Relation to the connection with Contract or Compact of the Civil Advantages enjoyed by a Church.

The language of those opposed to Free Church principles is often ambiguous, when they speak of Dissenting Churches being bound by contract, and of their liability to be compelled by a Civil Court to the observance of contract. For example, it is said that such Churches are independent of any Civil Court when they keep within their contracts, but that in case of transgressing their contracts, the Civil Courts may interpose and do justice between parties, if there be any civil right involved—that they will and must interpose, even though the act complained of be spiritual, and must judge of it even though it be an act peculiar to a Church Court, when it may draw after it any civil wrong,—and that when a man has been proceeded against in opposition to what the Court judge to be terms of contract, it must be in vain to plead that the procedure was spiritual; but the Court

must protect him and give him relief. The ambiguity in this language lies in the question whether it means simply, that the Court will give relief by deciding matters of property or endowment in the complaining party's favour, or that it will also coerce the Church with reference to its exercise of ecclesiastical functions. For the same language was used by the judges in the Cardross case. Yet, they disclaimed the intention of coercing the Free Church, with reference to the position of Mr. Macmillan as a minister in its fellowship, or as a member of its Presbytery, and they ultimately gave effect to the disclaimer by dismissing his actions, because they would not entertain a proposal for reducing the ecclesiastical sentences when it had no relevant relation to a definite civil interest. They also intimated that a relevant action of damages against members of Assembly should have in it an allegation of malice.

Now, it is quite consistent with the foundations of Free Church principle to admit that every definite civil interest, such as the possession of a manse or a right to temporal emoluments, must be judged of with reference to contract, in so far as a case of contract may be fairly made out by title-deeds or other circumstances involving agreement, and that a Civil Court alone can decide the case, and is entitled to look at the whole ecclesiastical procedure in order to decide. We readily admit also, that the Civil Court may, without encroachment on the

ecclesiastical province, take means for bringing out all the particulars of ecclesiastical procedure, in a case where damages are asked with an allegation of malice. In either of these ways, protection or relief may be given without affecting the ground we take with respect to spiritual independence.

We do not therefore maintain, as some have alleged we do, that a man oppressed under an ecclesiastical sentence, is to have no relief. A judgment of Lord Romilly has been quoted, in which he speaks of enforcing the rules of a voluntary society. But it seems doubtful whether he had in his mind the distinction between conformity to these rules by parties who retain possession of a building, or cling to some other civil right, and conformity to them when every temporal possession or civil right affecting the matter has been given up. English lawyers seem often to neglect this distinction. Lord Romilly would probably not have differed from Lord Cranworth in declaring, that his court would not interfere with the rules of a voluntary society, except when some tangible question of civil property or right was brought before him. At any rate, let it be clearly understood, that Free Church principle allows every such tangible question to be settled exclusively by a Civil Court.[1]

The word compact seems to be used in reference to

[1] Appendix, No. IV.

the Established Church and its relation to the State, by some of her defenders in the present day. They seem to have forgotten how entirely the idea of any such compact was repudiated by the leading lawyers and by the Court of Session at the time of the Disruption. The junior counsel for the patron and presentee in the Auchterarder case suggested that idea. But the senior counsel rejected it entirely, and, along with the majority of the Court, represented the Church as simply a creation of the State, having no previous existence or rights. The senior counsel for the Church disclaimed the argument of a supposed compact, and even Lord Moncreiff declared that the relation was constituted neither by a creation nor a compact, but by a solemn recognition. Whether the relation be counted a creation, a compact, or a solemn recognition, the foundations of Free Church principle are quite consistent with entire submission to the absolute disposal by the Civil Court of all property or civil rights associated with an Established Church, according to that Court's own view of what the Acts of Parliament imply.[1]

2. Relation of the Old Foundations to the Freedom from alleged Contracts or Compacts which is involved in the Spiritual Obligations of Churches.

The language referred to in the previous section is ambiguous. For it has been interpreted by many who

[1] Appendix, No. II.

use it as implying a right in the Civil Court to coerce the Church in the exercise of ecclesiastical functions, provided the judges think that in that exercise she is breaking a contract. When it is asserted that a Dissenting Church exists and has power, *only* by contract, the foundations of Free Church principle are assaulted. These foundations imply that such a Church is formed, not by mutual contract, but by a conscientious persuasion, bringing the members together in a scriptural manner, through reverence for the authority of Christ. Their continuance in a Church with a special formula and confession is a continued profession of conscientious attachment to that formula and confession. But true Free Churchmen feel that their engagements are, strictly speaking, to Christ, and not to one another in the way of ordinary contract. In taking their part in the distinct government appointed by Him in His Church, they do not think themselves at liberty to follow any other rule than that of doing what, to the best of their judgment, appears most for His glory and the good of His people. Thus the old foundations must always prevent the Free Church from allowing the exercise of her ecclesiastical functions to be controlled or restrained by any judgment of a Civil Court about terms of contract. They must always oblige her to assert that she has both the duty and the right to perform any and every spiritual act which she judges desirable for the cause of Christ, whether she

can or cannot prove to a Civil Court that such act is specified or allowed in the particulars of her constitution.

An attempt has been made, as I have mentioned before, to override that conscientious view by the language of Gillespie, Rutherford, and Henderson, about the duty of the civil magistrate to "compel Kirkmen to perform the duty which *God requires of them*, to take care that they do those things which *ex officio* they are bound to do, and to command the ministers to observe the *rule commanded in the Word;*" and this rule has been assumed to mean the same thing as one required by a Civil Court's interpretation of the laws and constitution of a Church. Assuredly those careful and devout reasoners never anticipated such a perversion of their language. Perhaps this perversion may be thought to have support in the words of Gillespie, when he speaks not only of duties required by the clear Word of God, but also of those required by the *received* principles of Christian religion, and by the *received* ecclesiastical constitution of the Church. But the question here arises, what Gillespie meant by the word *received.* Received by *whom?* Or, acknowledged by *whom* as received? It is evident, from what I have before quoted from the Hundred and Eleven Propositions, that he assigned to the supreme ecclesiastical authority a thoroughly equal voice with the State in determining what the duties referred to were.[1] Let it

[1] Appendix, No. III.

not be forgotten that the main question must always be, not what is the civil power entitled to do in emergencies? but what is the obligation under which the Church lies to Christ as her Head and King? There is not a sentence in the writings referred to which exempts her from pursuing, in accordance with her own judgment as to His own voice in His Word, the line that seems best for His glory, in opposition to every demand of earthly power. Much less is there anything in those writings to justify her in surrendering her own conscientious view in obedience to orders which do not profess to be based on statements of the Divine Word, but merely on the opinion of secular judges regarding the terms of a contract. The sentiments that may be gathered from the words of those who framed the Second Book of Discipline, and of those who carried out the second Reformation, lead to two conclusions. They lead, first, to the conclusion that a collision might arise between two equal powers. In this conclusion Free Churchmen acquiesce. But they also, in the second place, lead to the conclusion that one of the powers might possibly have to do what we should now call persecuting the other, while the other might have to do what we should now call enduring persecution. From this second conclusion Free Churchmen dissent out and out, except in so far as the duty of enduring might arise from it.

A judge who exhibited kindness and courtesy in his

manner asked, when giving his opinion in the Culsalmond interdict, whether any one could doubt that, in the case of a Dissenting Church, the Court of Session would have power to enforce a contract; and, after making the supposition of its being found that a Presbytery could be held to have agreed to ordain and induct a person proposed by the donor of an endowment, he added the following words: "It would be no answer to say to us, 'You are not ecclesiastical, you cannot ordain.' The answer would be, 'No;' and for that reason we decern you to do it, as you agreed to do." That is to say, his lordship considered that the essence of Erastian encroachment would lie in the Court assuming the ministerial function of ordaining. He saw no encroachment in the Court assuming the power of ordering ordination; he saw no disregard of the authority of Christ, with respect to His sacred appointments, in a Presbytery placing itself in a position of being obliged to obey such an order. No Free Church Presbytery would ever put itself under the supposed obligation, or would yield to such a judgment as the one suggested in the reasoning of the judge.

It requires few words to show that the foundations of Free Church principle are at variance with the conception of such a compact between the Church and the State as may be interpreted by the Civil Courts towards their enforcing conformity to it in ecclesiastical action.

A Church adhering to those foundations cannot enter into a compact of that kind without unfaithfulness to her Head and King. She cannot bind herself to obey any other voice in ecclesiastical action except His own, when it speaks to her through His Word, as that Word may be impressed upon her judgment and conscience. She might face the idea of compact if it simply meant that the Legislature agreed to establish and endow her upon a certain understanding of her doctrines and laws; that it might afterwards find either a mistake to have been committed by it as to her meaning, or a change to have been made by her in her principles or modes of action; and that, consequently, it might fairly withdraw the advantages and encouragement which it had bestowed. She might acquiesce in a supposition which left her free to say that the Legislature was requiring things of her that were contrary to her own original understanding, and that, consequently, she must surrender her State advantages, and withdraw from the connection. But she would of necessity demur to any compact which binds her to submit to the smallest coercion in the exercise of her ecclesiastical functions.[1]

3. Relation of the Old Foundations to a well-ordered Harmony between Church and State.

When these foundations are looked at exclusively in

[1] Appendix, No. IV.

their scriptural character, and free of all complications from the arrangements of a particular national constitution, we have no occasion to distinguish between the supreme civil authority and the courts established by that authority for judicial action. We may look upon such courts simply as a department of the State's executive force. We need not distinguish between the case of a constitutional government and the case of a despotic sovereign. No matter what the special position of the particular civil functionary who comes into contact with us, our scriptural rule is, "Obey and submit to him in all temporal things, but do not allow his commands or prohibitions to turn you aside in the smallest measure from the line you think best for the Saviour's glory in carrying out what you believe to be part of that government of His Church which He has made distinct from the civil magistrate."

In the case of Churches not established, it depends not only upon their own action, but also upon the degree of careful discrimination exhibited by the civil authorities whether the operation of this fundamental Free Church principle can be kept in harmony with what is just and orderly. If two rules intimated within the last fifteen years be always observed, there need be no infringement of harmony. If, first of all, the rule laid down by Lord Cranworth in the Burntisland case, and ultimately given effect to by Lords Colonsay and Curriehill in the Cardross

case, be steadily and consistently maintained by Civil Courts, no direct encroachment upon what we count our spiritual liberty will occur. That rule is not to interfere with the regulations or working of a voluntary association, except for the purpose of deciding questions of definite and tangible civil interest, when these are brought forward in a regular manner. The other rule (suggested by Lords Colonsay and Curriehill) is that, in an action of damages against the members of a voluntary ecclesiastical court, an allegation of malice is required to make it relevant. These two rules are sufficient to obviate complaint on the part of Dissenting Churches that their spiritual independence is interfered with. I do not say that either or both can be held to embody an adequate recognition of the ties of conscience which bring men together in those Churches. But the consistent operation of both will prevent discord.[1]

It is maintained in some quarters that, if an Established Church be recognised as founded on our principle, the only logical inference is the Popish one, by which the Church is entitled to command the civil power in the exercise of its functions, or at least to enjoin authoritatively upon it the judgment which she has formed regarding the extent of her own functions. If the ecclesiastical obligation to Christ were the only obligation to

[1] Appendix, No. II.

Him recognised by us, I grant that legitimate reasoning would lead to this conclusion. But we do not maintain the sole subjection of the Church to Christ and His Word more strongly than we do the sole subjection of the State to the same. We hold that the State is not at liberty to allow any judgment of the Church to turn it aside from the line which it thinks best for Christ's glory in fulfilling the duties of civil government. If the reasoning which identifies our claims with those of the Church of Rome were correct, then it would follow, from our premises regarding the subjection of civil authority to Christ and His Word, that the conscientious judgment of that authority must command the action of the Church. The twofold reasoning from our twofold premises would thus land us in a contradiction. There is fallacy, therefore, on both sides of the reasoning.

It does not follow from the obligation of either party to be ruled exclusively by its own conscientious judgment as to the mind and will of Christ, that it must command the conscience of the other party, who is placed under an equal obligation. The only true inference is, that harmony of action between the two parties may be interrupted or broken, and that, if the difference be of a serious or permanently influential character, they cannot continue connected with each other in the fulfilment of what their conscientious judgments severally impose upon them. But the evil of the disconnection

cannot be greater than what arises when the religious doctrine of the civil power is vitally at variance with the religious doctrine of the great body of Christian people in a kingdom. And there is more likelihood of a cure.

The adjustment of mutual relations between civil and ecclesiastical powers who concur in other vital points of doctrine, ought to be easier than the conversion from one strongly held religious faith to an opposite one held with equal strength. On the other hand, much better facilities for adjustment will arise, when the two powers are cordially admitted to stand upon an equal footing, and when they confer together on that footing, than when the one endeavours to tyrannise over the other. If all grounds of mutual jealousy be removed, terms of agreement may be speedily discovered. For where there is a genuine will, a practicable way will readily appear.

I do not, in this section, anticipate the question how far the Free Church doctrine of Establishment can be made to work in connection with such a Constitution as that of Great Britain. I shall afterwards have occasion to distinguish between the position of the Legislature and that of the Civil Courts with respect to such questions. I only wish here to point out that whether under a civil Constitution like our own, a *via media* between Popish supremacy and Erastian supremacy in civil relations to an Established Church can be made good or not, the

scriptural foundations of Free Church principle render it indispensable that persons who feel the obligations of them should never cease to aim at the attainment of civil and ecclesiastical harmony in some better way than either the Popish or the Erastian one.

There is a practical difference of serious magnitude between the Free Church Claim, and that of those contended for by either the Church of Rome or the High Church Episcopalians. Our claim is not for the spiritual independence of a special order of men separated by a mysterious sacredness from other members of the Church, but for the spiritual independence of popular societies, in each of which all professing believers adhering to it have their several places and functions. Our Church Courts are representative Courts, which, by their constitution, reflect the voice of congregations, while they largely guide and influence it. Whatever theoretical objections to our system may be raised by those who do not understand it, one generation of attached adherents after another have rejoiced in it as combining, in a satisfactory manner, the legitimate influence of knowledge, training, and experience, with an adequate expression and representation of popular religious desires. Thus the laity of Presbyterian communities, so far from being jealous of spiritual independence, have earnestly welcomed and defended it.[1]

[1] Appendix, No. IX.

CHAPTER IV.

IMPRESSIONS AND EXPECTATIONS REGARDING THE CLAIM OF RIGHT BEFORE AND AT THE DISRUPTION.

1. Impressions and Expectations from May 1842 till May 1843 as to its Effect on the Pending Conflict.

The adoption of it was enough, apart from all attendant demonstrations, to show that the Church had ceased to expect a favourable consideration of her position from the Court of Session or the House of Lords. The speeches made by members of Assembly in support of it proved that all hopes of obtaining relief from these quarters had been abandoned. But by the firm maintenance of their ground, and the clear and full exhibition of its strength, the authors of the Claim expected to make the discussion of their defence against all remaining legal assaults so complete and convincing, that the overthrow of the ancient constitutional bulwarks by the civil tribunals, if it did take place, might appear in colours so conspicuous as to enlighten and arouse the defenders and friends of the sacred citadel throughout Scotland and the world.

This expectation was largely realised. The adop-

tion of the Claim was followed by several elaborate discussions in the Court of Session, which exhausted both sides of the argument on its constitutional declarations. Those declarations showed that the Church would not accept of its rejection at the hands of the Civil Courts, but appealed to the Legislature. The tone of expectation as to its reception by Parliament was not sanguine. But confidence in its truth and justice led Dr. Gordon, in seconding the motion for its adoption, and in expressing the feeling of his supporters as well as his own, to say that he did it with a hope that when the Claim came before "an enlightened Legislature—before high-minded and honourable men—they would not refuse a patient perusal of it." "I have the conviction, which I am as little willing to relinquish," he went on to say, "that if they do give it a patient perusal, they will see the justice—and, therefore, the policy—of acceding to it. But if, unhappily, it should be otherwise—if they have resolved on refusing to grant what we think reasonable on our part to ask, I feel, for one, that we are bound to tell them that we cannot carry on the affairs of Christ's house under the coercion of the Civil Courts."

The effect of the Claim upon the minds of some distinguished gentlemen, who, as members of Assembly, took a leading part in a resolution to transmit a copy of it to Her Majesty, was remarkable. Not only did Mr. Makgill Crichton speak of it as an able document, containing an

admirable digest of the law of the case, and a full and concentrated statement of the arguments, which did honour to the Church in sanctioning it, and to Mr. Dunlop, who had drawn it up; but Mr. Bruce of Kennet (father of Lord Balfour of Burleigh), was so filled with admiration of it that he wished the Assembly to express to Mr. Dunlop their decided approbation and their satisfaction with his zeal and devotedness.

The Assembly believed that the Claim would tell on the minds of many members of Parliament and other public men. It did so. Its influence was such in Scotland that twenty-five out of thirty-seven members of Parliament for Scotland, led by Mr. Maule, Mr. Rutherford, and Mr. Patrick Maxwell Stewart, and supported by Sir George Grey, voted in its favour. The impression produced by it was great at the time upon impartial inquirers. The late Duke of Argyll and the Marquis of Breadalbane advocated it, and the present Duke of Argyll, referring to it quite recently in his letter to Mr. Taylor Innes, said: "I admire that document as much as you do. It is the great boast of the Free Church that it has never been answered. As an argument on constitutional law, with the exception of a few paragraphs, I believe it to be unanswerable."

The main object of the Church was not to verify an expectation that might be vain, but to put on permanent record a complete and unanswerable statement of her

case. The accomplishment of this object is evidenced partly by such testimony as that of the Duke of Argyll, partly by the absence of any reply to the Protest of 1843 from the existing Established Church, and partly from the character of the attacks that have recently been made upon the Claim of Right itself.

Any person carefully watching the course of opinion among sober-minded, scripturally instructed, and spiritually earnest Presbyterians, both in town and country, during the legal contentions, would have discovered that it was steadily advancing to a point where it would be ready to terminate in an outburst of zealous sympathy, if the action of the ministers and elders should be fitted to call forth such an outburst. Through the frequency of discussion, both in the Court of Session and in the Church Courts, a fire of enlightened zeal for the cause of spiritual independence had been kindled in many a humble cottage, as well as in higher places. The *Witness* newspaper, with the wonderful brightness of Hugh Miller's genius popularising the whole subject and conveying vivid impressions, had been widely circulated. Even before the preparation of the Claim of Right the congregations of the Church had become largely familiar with the essentials, and even with many details of the controversy. Speeches had been diligently studied by rustic intelligence as well as by educated reasoners. Four years had done much work in ripening the convic-

tions which were afterwards openly manifested. The year which elapsed between the Assembly of 1842 and the Disruption was still more prolific of materials for general instruction. The Claim of Right and the corresponding Protest in 1843 were far more clearly apprehended and appreciated by people of all ranks and conditions, than it is easy for most of the existing generation to believe. Peasants at home and missionaries abroad were equally ready to respond to the voice that summoned them on the memorable 18th of May.[1]

2. Impressions and Expectations as to the Effect upon the Condition of the Free Church after the Disruption.

The ministers and elders who adopted the Claim of Right, who met in Convocation, and who followed Dr. Welsh and Dr. Chalmers to Tanfield, were not generally alive to the amount of zealous sympathy and countenance which awaited them. They had no lively expectation of the extended following, or even of the moderate measure of pecuniary support which the Free Church movement realised from the outset. At the Convocation they put away from them the conceptions of financial success which the sanguine temperament of Dr. Chalmers pictured forth for their encouragement. They preferred for themselves and others the simplicity of the thought that they

[1] Appendix, No. II.

were about to cast themselves upon the providence of God, without allowing themselves to be influenced by earthly expectations.

The authors of the Claim of Right expected to be free in conscience after the Disruption to act upon the principles of that document in a manner that was no longer open to them in the Establishment. When the terms of establishment had, in their estimation, been authoritatively declared against them, they no longer felt free in conscience to violate those terms. But they were persuaded that, in a disestablished condition, no terms of human adjustment could destroy the fulness of their freedom in conscience to follow out at all hazards their own conscientious judgment of what might be required in the spiritual government of His Church for the glory of their Lord and the good of His people. They not only expected, but knew for certain, that this freedom in conscience would belong to them. It was on that account alone, and not through imaginations as to how far they might or might not again be molested by secular forces, that, with lightened hearts and peculiar joy, they proceeded to complete their sacrifice and to carry on their work.

It is an entire misapprehension to suppose that they took for granted their escape by the Disruption from the spirit of opposition to their views, and from the fallacious principles of legal judgment which had driven them from their State connection. On the 28th of January, 1843,

Dr. Candlish said, in the Presbytery of Edinburgh, with reference to his motion on the Stewarton decision, as being the final step in the controversy within the Establishment: "My belief is, that it is the first step of a far greater controversy, to be carried on out of the Establishment." On the 31st of January, he said, in the Commission of Assembly, speaking of the freedom which he claimed at the hands of the State for the Church, that it was "a freedom which, if once overturned in the Established Church, will not long survive in any Church within the land. For the principle stated in Sir James Graham's letter does really negative the same claims as those made by the Church of Scotland when put forth in any situation by a Church of Christ. The old argument, that there cannot be an *imperium in imperio,* is an argument which tells against a Church, whether connected with the kingdoms of this world or not. The real question is, whether it is accordant with the safety of civil government to acknowlege any other king but Cæsar—to acknowledge any other kingdom but Cæsar's." The question was put to Dr. Chalmers, in the Convocation, whether he thought the Church would be safe from Erastian encroachment, though disestablished. His only answer was, "When they persecute you in one city, flee ye into another;" and in the City Hall of Glasgow, on the 10th of March, 1843, he said: "Perhaps, after we get free, they may change the conditions on which they

now grant toleration. Then, if they do, here is a movement toward persecution, and for this we are ready also. We are ready to do all and to suffer all for the sake of that Gospel which we are commissioned to go and preach to every creature. They may call it an *imperium in imperio;* they may say that we intrude upon the legitimate power of the Civil Courts or the civil law. It is no more an intrusion on the civil law than Christianity is an intrusion on the world."

On the 25th of the same month, Dr. Candlish said in the Waterloo Rooms, Edinburgh: "It is possible that even out of the Establishment the claims that have been put forth against us by Cæsar and his courts may follow us; for indications and hints were given in Parliament of principles which, if carried out, would deny freedom not only to the Church established, but to the Church of Christ. Oh! let us be resolved to maintain the rights of Christ the King, whether in or out of the Establishment, under persecution, if need be." On the same occasion Dr. Chalmers said: "The power which has driven us from the national may lift the hand of persecution and violence against us as a Voluntary Church."

In the year 1858, Dr. Candlish, when bringing the case of Mr. Macmillan, of Cardross, before the Assembly, reminded his audience that before the Disruption he was always accustomed to maintain that the same grounds on which the Civil Court then proceeded would warrant

their interference with the Church when separated from the Establishment. Thus the evidence is abundant, that the authors of the Claim of Right and those who followed them were not, in making the Disruption, influenced by the imagination that their principle of spiritual independence would be safe from all assault when they should be acting in a Voluntary Church. On the contrary, they carried out their movement under the persuasion that the legal views which had oppressed them might possibly follow them, and oblige them again to suffer in what they believed to be their Master's cause.[1]

[1] Appendix, No. II.

PART II.

Contents and Vindication of the Claim of Right.

CHAPTER I.

ITS OCCASION IN ALLEGED ASSAULTS BY THE COURT OF SESSION.

Its first paragraph does not set forth its foundations, but simply explains its occasion. Supposed securities are there spoken of as having long been thought to place the liberties, government, jurisdiction, discipline, rights, and privileges of the Church beyond the reach of danger or invasion, but as having been recently assailed by the Court of Session (the very Court who ought to have protected them) to an extent which threatened their entire subversion.

The idea of any assault having been made by that Court upon the rights of the Church appeared extravagantly out of the question to some of her most upright and honourable legal opponents at an early stage of the collision. Their habits of thought seemed to render

them incapable of apprehending the true character of that idea. For example, a judge of eminent position, in concluding his opinion on the Lethendy case, said: "I cannot help adverting to a most mistaken notion which seems to prevail, that the controversy in regard to the power of the Church and the extent of its jurisdiction is one between the Church of Scotland and this Court, and that it behoves the Church to resist the encroachments that are attempted to be made by us on its rights." He added, that a little sober reflection might show those who were loudest in what he called "this clamour" that the Church had chosen to come into conflict with the law, the statutes of the realm, and the legal rights of the lieges of Scotland, the Court of Session being the mere organ of the law. Such a statement made in the face of the arguments used by the minority of the Court in the Auchterarder case exhibited a strange inability to perceive either the nature of the constitutional grounds on which the complaint of encroachment was based, or the strength of matured conviction which led to its earnest maintenance. With a similar blindness to the real aspect of the position contended for, persons of good understanding in other matters have continued till the present time asserting that, since all that the Non-intrusionists demanded before 1843 was what in their own view had been conceded to them by statute and common law, the Civil Court was the only legitimate and competent

tribunal for deciding the questions that arose; and so, being called upon to decide them, was acting judicially, and cannot be considered as having through any decision made an invasion on the province of the Church.

Such reasoners seem not to be aware of the most conspicuous contention for the Church in the conflict before the Disruption. It was that, by the terms of her establishment, her Courts had assigned to them the function of interpreting the statutes and common law of the realm for their own guidance, in so far as either touched their direct ecclesiastical action; that in this respect they stood on an equal footing with the Civil Court, and that their jurisdiction was thoroughly co-ordinate with that which belonged to it. This was the position which had been claimed since the year 1838. This is the inference to be drawn from the opinions of the minority in the Court of Session, and this is the footing on which the first paragraph of the Claim of Right proceeds. It is said that a Civil Court does not act of its own motion, but is obliged to act by the applications made to it; that it must decide according to its best judgment, and that, consequently, it cannot be justly accused of assault, invasion, or encroachment. The argument would be conclusive where no conflict of jurisdiction is concerned. When the question before a Court relates to its own jurisdiction, the case is different. If one man, however conscientiously, commit the error of

appropriating what really belongs to another, he may be acquitted of all wrong intention, but he may be justly found to have encroached upon his neighbour's rights. And so, also, if a Civil Court, with all honesty and conscientiousness, commits the error of assuming a jurisdiction which does not belong to it, but belongs exclusively to another Court; the application of a third party may have been the original moving cause of the error; still, the error is one which renders the Civil Court justly liable to the charge of unconstitutional encroachment.[1]

This is the charge brought in the Claim of Right against the Court of Session. The first paragraph refers to the encroachments as having rendered it necessary for the Church to take steps of a decisive character. Something more sacred than constitutional right is indicated both by the opening and the closing words of that paragraph to lie at the root of the course which she was adopting. But the occasion of it is attributed to the assaults of the Court of Session. Whether the allegation of such assaults be well founded or not will be the object of inquiry in a subsequent chapter.

[1] Appendix, No. II.

CHAPTER II.

STATEMENT OF FOUNDATIONS FOR THE CLAIM OF RIGHT.

1. Essential Doctrine of the Church regarding her Distinct Government.

The second paragraph assumes the truth of the representations of fundamental Free Church principle which I have given in the introductory part of this publication. The terms of that paragraph are as follows :—" Whereas it is an essential doctrine of this Church, and a fundamental principle in its constitution, as set forth in the Confession of Faith thereof, in accordance with the Word and law of the Most Holy God that there is no other Head of the Church but the Lord Jesus Christ (chap. xxv. sec. 6); and that while God, the supreme Lord and King of all the world, hath ordained civil magistrates to be under Him over the people for His own glory and the public good, and to this end hath armed them with the power of the sword (chap. xxxiii. sec. 1); and while it is the duty of people to pray for magistrates, to honour their persons, to pay them tribute, and other dues, to obey their lawful commands, and to be subject to their

authority for conscience' sake," from which ecclesiastical persons are not exempted (chap. xxiii. sec. 4); and while the magistrate hath authority, and it is his duty, in the exercise of that power which alone is committed to him—namely, the "power of the sword," or civil rule, as distinct from the "power of the keys," or spiritual authority, expressly denied to him, to take order for the preservation of purity, peace, and unity in the Church; yet the Lord Jesus, as King and Head of His Church, hath therein appointed a government in the hands of Church-officers distinct from the civil magistrate (chap. xxx. sec. 1); "which government is ministerial, not lordly, and to be exercised in consonance with the laws of Christ, and with the liberties of His people." In the third paragraph this government is described as distinct from that which belongs to the supreme power of the State, and as flowing directly from the head of the Church to the office-bearers thereof, to the exclusion of the civil magistrate.

The language thus employed was manifestly intended to embody the doctrine of the Second Book of Discipline and of George Gillespie, as a doctrine derived on the one hand from the Word of God, and protected on the other hand by the ecclesiastical constitution of the country. The authors would not have thought that doctrine worth contending for had they not traced it to a divinely inspired origin. They would not have contended in the method which they adopted, had they not found

bulwarks for its defence in legislative provisions by their ancestors.

2. Things Scripturally comprehended under the Distinct Government.

The third paragraph of the claim states the objects comprehended under that government. It enumerates the preaching of the Word, administration of the sacraments, correction of manners, the admission of office-bearers, their suspension and deprivation, and the infliction and renewal of Church censures. But it also lays particular emphasis upon the whole "power of the keys," which, it says, is declared by the Westminster Confession, in conformity with Scripture, to have been "committed" to Church-officers, and which, as well as the preaching of the Word and the administration of the sacraments, it is likewise thereby declared "that the civil magistrate may not assume to himself." This doctrine regarding "the power of the keys" implies that the Church has assigned to her by Christ not only the ministerial functions of performing such ecclesiastical acts as preaching, administering the sacraments, and ordaining to office, but also the *power*, as part of a distinct government, to regulate independently the circumstances in which, and the parties by whom, such acts are to be performed.

So far as the sphere of ecclesiastical movement is concerned the right contended for is thoroughly comprehen-

sive. It implies that, in every arrangement for pastoral work or presbyterial or sessional discipline, the Church has liberty to follow what, in her own constitutional judgment, she considers best for the Saviour's honour, and for spiritual interests, without restraint from the civil power. The statement corresponds to what in previous sections I have represented to be required by our Lord's original appointments, as understood by the old authorities in the Reformed Church of Scotland.

3. Things excluded from the Distinct Government.

The fourth paragraph contains a very explicit announcement that, since the jurisdiction and government thus claimed regard only spiritual condition, rights, and privileges, they do not interfere with the jurisdiction of secular tribunals, whose determinations as to all temporalities and as to all civil consequences attached to ecclesiastical decisions, the "Church hath ever admitted and doth admit to be exclusive and ultimate, as she has ever given and inculcated implicit obedience thereto." There is here a manifest repudiation of the Popish claim to temporal supremacy. That claim is eagerly spoken of by Erastian writers as following logically from what Free Churchmen maintain. But candid men will surely admit that at least it could not be more strongly condemned than it is by the language of the Free Church Claim of Right.[1]

[1] Appendix, No. IX.

The question remains, how far the view taken in that Claim can be harmonised with the right order of constitutional government in an earthly kingdom? But no such question ought to prevent a candid acknowledgment that the promoters of the Disruption entertained decided opinions in opposition to Ultramontane pretensions, and that they conscientiously believed in the practicability of their own conception for the satisfactory adjustment of relations between Church and State. The feasibility of that conception will be best judged of after examination of the constitutional principles which, in 1842 and 1843, they set before the Assembly and the Legislature.

CHAPTER III.

THE INTERPRETATION OF CONSTITUTIONAL LAW.

1. References to the Law of Patronage and to the Principle of Non-intrusion.

In accordance with the well-known desire of Dr. Chalmers, the subjects of Patronage and Non-intrusion were referred to only in the way of narrative, so as to show out of what circumstances the alleged encroachments of the Court of Session arose. The object was to concentrate attention on the claim to spiritual independence and co-ordinate jurisdiction, and to maintain that the judgments complained of were unwarrantable on whatever ground they were based, and whether the acts of the Church had been legal to civil effects or not. Accordingly, out of eight references to the subjects now spoken of, seven are occupied with simple statements of alleged historical facts regarding them. Some of these alleged facts are undeniable; others are associated with the legal contentions of the Church.

The first reference is in the ninth paragraph. It calls attention to the undeniable facts connected with the settle-

ment of the Patronage question at the Revolution, and adverts to the legal conclusion adopted by the minority in the Court of Session, that, under the old law, non-compliance with the obligations of Patronage led only to a forfeiture of the benefice, and not to interference with the liberty of the Church in the collation of ministers. The second reference is in the tenth paragraph, and simply exhibits what were undeniably the terms of the Act of Queen Anne restoring Patronage, and indicates that it was a violation of the security furnished by the Treaty of Union. The third reference is in the eleventh paragraph, and represents the Church as having not only protested against the Act of Queen Anne, and sought for its repeal, but as having at the same time, notwithstanding its enactment, maintained and practically exercised, without question or challenge, the jurisdiction of her Courts to determine ultimately and exclusively under what circumstances they would ordain ministers or constitute the pastoral relationship. The fourth reference is in the twelfth paragraph, and records the undeniable facts that the Church had required the form of a call from the people before the admission of a minister; and had, both before and after the passing of the Act of Queen Anne, declared it to be a fundamental principle, that no pastor be intruded contrary to the will of the people. The fifth reference is in the thirteenth paragraph, and specially marks the reassertion by the Assembly of the same fundamental

principle in 1736, and the more recent declaration and regulations regarding it in 1834. The sixth reference is in the fourteenth paragraph, and relates to the decision of the House of Lords in 1839, confirming that of the Court of Session in the Auchterarder case, and to the distinction which the General Assembly of that year had drawn between submission to it with respect to the benefice, or other civil rights or privileges, and the entertainment of it as a reason for abandoning her fundamental principle in her ecclesiastical action. It adverts, also, to the steps taken by that Assembly for avoiding further collision, and obtaining an harmonious adjustment by which a separation between the cure of souls and temporalities might be averted. The seventh reference is in the fifteenth paragraph, and represents the judicial decisions of the Court of Session in the last century in questions of Patronage as having been in favour of the distinction drawn by the Assembly of 1839, and of the absolutely exclusive jurisdiction belonging to the Church Courts in ecclesiastical arrangements.

The carefully ordered sentences of these seven paragraphs prove that, however anxious the authors of the Claim of Right were to set forth truly the history and circumstances of the position which they occupied, and however decidedly they proclaimed the obligation which they felt to persevere in carrying out their principle of Non-intrusion, they carefully abstained from putting the

abolition of Patronage, or even a legal recognition of Non-intrusion, upon the same level with redress for the encroachments made on the exclusive jurisdiction of the Church Courts. They were willing to encounter the separation of benefice from cure, with either its immediate or its remoter consequences, waiting patiently as long as they reasonably could while any hope of adjustment remained. They were not willing to take part in carrying on the government of a Church subject to the coercion attempted to be exercised by the Court of Session.

In some of the other paragraphs relating directly to the subject of that coercion, the liberties of the people and the conscientious objection of the Church to intrude are incidentally maintained. But as such allusions are all for the purpose of protesting against the coercion, as unconstitutional, and as an assault which could not be submitted to, it is unnecessary to speak here more particularly about them.

There is, however, an eighth more pointed reference to the Act of Queen Anne in the twenty-first paragraph, which contains a protest against whatever had been done, or whatever might afterwards be done, either by the Legislature or by the Civil Courts, in alteration of, or derogation to, the government and privileges of the Church, as secured by the Treaty of Union. The protest is to the effect, that everything thus done, without the consent of the Scottish Church and nation, shall be in itself void

and null, and of no legal force or effect. The meaning is, that the Scottish nation might legitimately demand that the Act of Queen Anne should be repealed as involving a violation of good faith on the part of England; that the Scottish Church cannot consistently submit to obey it, if interpreted to give coercive power to the Court of Session over her ecclesiastical action; and that both the nation and the Church shall be free on any favourable occasion to claim as a right the restitution of all that might be lost through a refusal of the Legislature to concede the present claim. But the paragraph also contains an explicit statement of the determination of the Church to yield submission to all the Acts and sentences referred to in so far, though in so far only, as these may regard civil rights and privileges, whatever opinion they may have as to the legality or justice of the same, even while protesting that such submission shall not be deemed an acquiescence therein.

2. Value of an Appeal for the Claim of Right to the Opinions of the Minority in the Court of Session.

In ordinary legal questions it is not desirable to dwell upon views which have been authoritatively overruled. If this were done by lawyers it would tend to introduce an injurious uncertainty into the law. If persons not trained in legal experience were in the habit of doing so, or were ordinarily countenanced in doing so, a dangerous

want of confidence in our judicial institutions might be engendered to no good purpose. It is not surprising, therefore, that even gentlemen of the legal profession connected with the Free Church of Scotland should shrink from any attempt to revive the constitutional arguments which were not successful before May, 1843. It is also very natural that those whose business it is to study the law as it now is should be gradually led to turn away from, or even to reject, conceptions which have been long ago excluded from judicial recognition. The force of conviction which the expression of those conceptions brought home to the minds of contemporaries can hardly be realised by the greater part of the existing generation. The well-founded idea in application to ordinary matters, that it is anarchical to adduce the sentiments of judicial minorities in opposition to the authoritative declaration of the existing law, raises a prejudice against arguments founded on what such minorities have said respecting ecclesiastical jurisdiction. This prejudice is increased by the fact, that the judges composing such minorities have not failed in subsequent decisions to recognise the principles which have been authoritatively established, however much these may have been contrary to the opinions formerly expressed by them.[1]

This last-mentioned consideration ought not to influence us. The obligation resting on a judge to

[1] Appendix, No. V.

recognise the law, as it has been actually declared, cannot destroy the weight due to his carefully considered and elaborately expressed opinion upon a subject of legal importance, while the points involved were still open. At the same time, the admission must be frankly made, that it requires both a very peculiar and a very strong case to justify the maintenance of the ground taken by a minority of judges in opposition to what a supreme tribunal has decided.

I contend that the vindication of the Free Church Claim of Right at the present juncture presents a case sufficiently peculiar and strong to justify an exhibition of the constitutional arguments that were urged with great power by the judges who sided with the Church in her pleadings before the Disruption. Those pleadings did not relate to an ordinary dispute as to civil rights, in which nothing except the interests of two contending parties was involved. They related to a great constitutional question, in which the jurisdiction of the Court itself was concerned, and in which the ancient rights of a national institution, alleged to have a stronger footing in the Legislature of the country than that of the Court itself, were thought to be put in jeopardy. If the arguments of the judges in the minority were well founded, the decision of the majority had the effect of destroying the Church as a national institution, of violating solemn securities, and of overturning the constitution of the

country. The statement that such was the effect rests not only upon the views of the Claim of Right, but upon what judges indicated as the inevitable result of the decisions which they opposed. The grounds on which they proceeded must be thoroughly considered by those who would thoroughly vindicate the Disruption, and the peculiar position of the Free Church of Scotland.

3. Conclusions on the Jurisdiction Question by the Minority in the Court of Session.

Before examining the arguments for the co-ordinate jurisdiction of the Church, it is desirable to see what that co-ordinate jurisdiction amounted to in the view of those who supported it. But at this point it is requisite to take notice of a distinction which requires to be carefully marked. I mean the distinction between the doctrine of spiritual independence as resting on a scriptural foundation, and the protection for the conscientious maintenance of that doctrine which may be furnished by the civil Legislature of a country.

The protection may be given by a Legislature which itself sees the force of the scriptural argument, and sympathises entirely with the Church. Or it may be afforded by a Legislature which has no appreciation of that argument, but desires to respect the constitutional convictions of those who have. Thus, the result of legislative arrangement may be a thorough protection for

the Free Church principle, even though the Legislature are not themselves converted to Free Church views.

This distinction leads to another distinction—I mean the distinction between the scriptural independence of the Church in its relations to the supreme power of the State, and the constitutional independence of the Church Courts in their relation to the Civil Courts. In speaking of the scriptural foundations of the Claim of Right, I remarked that it did not signify as regards those foundations with what form of civil authority the Church came into contact. It was unnecessary at that stage of the argument to distinguish between the supreme power of the State and the Civil Courts of the State. But when we have to deal with constitutional questions in a country like our own, we must keep in view that the Civil Courts are constitutional authorities, established by the State for the interpretation and enforcement of laws. In civil matters the Legislature carries out its enactments through the instrumentality of those Courts. The protection of the scriptural doctrine of spiritual independence must, therefore, rest under the constitution of Scotland, upon the relations established between the Civil and the Ecclesiastical Courts.

Thus the spiritual independence of the Church might, in the eyes of lawyers, come to mean simply the constitutional independence given to the Church Courts with relation to the Civil Courts; and judges in the latter

Courts might reasonably regard that independence in the light of a constitutional privilege conceded by the State. Their doing so need not be held to touch injuriously the scriptural doctrine, that every true Church is independent in spiritual things, even of the State. But full protection through Acts of Parliament and acknowledged principles of law for the conscientious carrying out of that doctrine, might be allowed even by men not believing it themselves, in the constitutional adjustment between Civil and Ecclesiastical Courts.[1]

Looking, then, at the conclusions of the minority in the Court of Session, we do not require for defence of the Claim of Right to find attestations by them to the truth of our scriptural foundations, or statements indicating that the Church is spiritually independent of the State itself. We simply require their testimony to the assertion, that the Legislature had made the Church and her Courts constitutionally independent of the Civil Courts in the ecclesiastical department, and had put the Ecclesiastical Courts in a thoroughly co-ordinate position with that of the Civil Courts, so that the Court of Session had no more right to interfere with the action of the General Assembly than the General Assembly had to interfere with the action of the Court of Session. Let us see, then, what on this footing was the constitutional doctrine of the six judges who differed from the adverse

[1] Appendix, No. IV.

judgments. I mention the number six, because while Lord Glenlee was one of the five in the Auchterarder case, Lord Ivory succeeded him on the Bench, and was one of the five in later cases.

Lord Fullerton.

Lord Fullerton admitted that, however superior to earthly jurisdiction the Church might be in the spiritual sense, still as the Established Church of Scotland, privileged and endowed, she owed her institution to the State, and was the creature of the law of the land. But this view did not prevent him from asserting in the first Auchterarder case that the Church and her Courts stood on exactly the same footing with the Civil Courts. "It does not, and cannot follow," he said, "from the circumstance of the Church being as an Establishment subject to the Legislature, *that the Church or the Church Courts are subject to the Court of Session.*"[1] He added that each class of Courts had its proper sphere, which the other was not entitled to invade, though both the one and the other might go far enough wrong without any other remedy than the voice of public opinion, or the interference of the Legislature. In answer to the statement, that there ought to be no wrong without a remedy, he urged that the plan of one kind of court being pre-

[1] The italics in my quotations are mine, except when I state the contrary.

dominant over all others, would not secure an adequate remedy. For there might still be the possibility of error, precipitancy, and prejudice in that predominant court. Referring to the distinction between civil and ecclesiastical jurisdiction, he concluded his emphatic declaration on the subject with these memorable words: "I am not entitled to assume that the control of the one by the other is demanded by the necessity of the case, and thus, reversing the ancient error to *provide against the possible fallibility of the Church by the supposed infallibility of the Court of Session or any other Civil Court.*"

The opinion in subsequent cases of a judge who was in the minority in the Auchterarder case, requires to be considered in the light of his obligation to accept of the law as interpreted by the House of Lords. His bowing to their interpretation implies no change of his own original view. But when he takes opportunities of repeating that view, in so far as he sees the way open to it, he exhibits all the more the strength of his conviction.

In the case of the Lethendy interdict, Lord Fullerton felt himself bound by the Auchterarder decision to acquiesce in the judgment, that the Presbytery were censurable for disobeying that interdict. But he grounded his doing so upon the fact of the question in which he had differed from the majority having been settled by the House of Lords. In the application, however, for an interdict against the carrying out of the

suspension of seven ministers in the Presbytery of Strathbogie, through the spiritual ministrations of the persons sent by the Commission of Assembly, he not only opposed what is admitted on all hands to have been an extreme and unwarrantable judgment, but he took occasion also to vindicate with special clearness the co-ordinate jurisdiction of the Church Courts. Referring to what he considered the existing collision between two sets of courts, he said: "In every case of collision between courts, claiming each to be independent and supreme, the same acts are expressed by terms of exactly opposite signification." Then pointing out how the Court of Session held the conduct of the seven ministers to be *dutiful obedience*, he went on as follows:—"The Church Courts hold, upon grounds which I am bound to believe they conscientiously consider satisfactory, *that* judgment of your lordships (the Auchterarder one) to be an encroachment upon their jurisdiction, and consequently they must hold compliance with your orders to be a *contumacious resistance of theirs*." "Neither party is entitled to say that the other is wilfully or morally wrong. I may, perhaps, be led to make some allowance for their errors, as it is one in which I myself shared until set right by the judgment of your lordships and the House of Lords." He then indicated that, even though error be committed, its commission will not justify interference by the courts with acts that are clearly ecclesiastical.

The following extracts set forth a few of the pithy remarks by which he illustrated his representation :—

"In order to authorise this Court, the question of legality or illegality must be competently raised in a question of civil rights."

"If the rights alluded to apply to rights and privileges purely ecclesiastical, I demur to the proposition that this Court possesses any such power of protection." "The protection—the granting or withdrawing of these rights—is, I understand, conferred by law on other tribunals as absolutely and exclusively as the jurisdiction in civil cases is conferred on us."

"Extreme cases prove nothing."

"Every Supreme Court may commit the grossest injustice. When that is done a remedy will be found." (He maintains that it must not be found in the assumption by another court of power to review what is clearly foreign to its jurisdiction.) "The Church Courts would be just as well entitled to say that the Court of Session might abuse its power of review as we should be to say that they would abuse their power if not subject to review."

"It is impossible to deny that they (the Church Courts), like other courts of exclusive and independent jurisdictions, may consider themselves to possess the *right inherent in all supreme jurisdictions, of determining according to the best of their lights, whether a parti-*

cular point falls within their supreme jurisdiction or not. To say that that power may be abused is just to say that every power may be abused."

The next extracts are from his opinion on the application for interdict in the Culsalmond case.

"I hold it to be established as firmly as any point can be established, both by theory and by the most authoritative practice, that the general power of the Court of Session to redress *all wrong committed by other courts*,[1] has no existence in the law and constitution of this country." "The pure and sole ground for interference with the proceedings of any separate class of courts is not that these courts have committed wrong and exceeded their proper jurisdiction, but that they have done so by encroaching on ours."

"What is asked in this suspension and interdict but to obstruct or defeat the order or sentence of the judicatories of the Church directly in the face of the statutes, and to authorise Mr. Middleton to do that which the Act of 1693 declares to be a *high contempt*[1] of the authority of the Church *and the laws of the land.*"[1]

"When a religious system embraces particular theological dogmas in regard to the ecclesiastically spiritual supremacy or headship of the Church from which certain practical consequences in regard to the independence of the Church Courts on all similar tribunals necessarily

[1] These italics are Lord Fullerton's.

flow, and when the Legislature sanctions and adopts that system as the established religion of the State, it would be difficult to deny that it *co ipso* adapts and sanctions those practical consequences as to jurisdiction which are inherent parts of the system. That implication would go far to sustain in this country the absolute independence of the Church *in re ecclesiastica.*" [1]

Lord Fullerton added, that this was not left to implication, because the express words of the twelfth Act of the Parliament of 1567 were—"That there be no other jurisdiction ecclesiastical acknowledged within this realm other than that which is and shall be within the same kirk in that which flows therefrom concerning the premises." The premises were the preaching of the true Word of Jesus Christ, correction of manners, and the administration of the holy sacraments. His lordship remarked, that it would be absurd to suppose that these were regarded as themselves exercises of jurisdiction, and held the meaning to be clear, that they were counted to be matters or subjects to which the exclusive jurisdiction related.

In the Stewarton case he embraced a view of the statutes, and the history which supported the right of the Church to be protected in the performance of the acts complained of as belonging to the sphere assigned to her.

With reference to the application for reduction of the

[1] The italics are Lord Fullerton's.

deposition in the Strathbogie case, and the allegation that the General Assembly was supreme when it did not abuse its power, Lord Fullerton said: "The power to pronounce the sentence in a court admitted to be supreme necessarily implies the power to judge whether or not the offence warrants the sentence. *If it commits flagrant wrong, it is not an excess of power letting in any separate court, but an abuse of power, for which it is accountable to the State.*"

Adverting to the opposite doctrine on the supposition of the Court holding it, he added: "We allow the Church Courts supreme ecclesiastical jurisdiction in form, while we deny it in substance, and we assert for the Civil Court in substance that very power which we profess to disclaim."

Lord Moncreiff.

Lord Moncreiff, speaking in the Auchterarder case, contended that by the Act 1592 there was "a direct committal of all ecclesiastical affairs into the exclusive jurisdiction of the Church Courts," and that there was also a "distinct recognition of the whole discipline and jurisdiction as previously in practice under the Second Book of Discipline in all points which had been agreed upon in conference as recorded by Spottiswoode." He further maintained that at the Revolution the Legislature made the jurisdiction of the Church to depend not

on special Acts of Parliament, but broadly "on the custom and practice of Presbyterian government" throughout the kingdom. Referring to the fact that from the Revolution to the date when he spoke "the Church, through its assemblies and inferior courts, had been in the undisputed enjoyment of the fullest powers of making laws for the general interests of the Church, and of directing the inferior courts in every department of ecclesiastical affairs, he expressed himself in the following sentences:—

"I cannot, after all this, think it in the least doubtful that the Church is supreme in all matters ecclesiastical. I believe that this is the very first example in the whole history of the Church of an Act of Assembly in matters belonging to the ecclesiastical functions of its Presbyteries being attempted to be challenged in any Civil Court."

"After having brought the deduction to this point, need I ask my Lord, whether a Church so formed and consolidated equally by statutes and by the usage of centuries, the security of which was made an indispensable condition of the Revolution Establishment, an equally indispensable condition of the union of the kingdoms, and the first sworn duty of every sovereign who is called to the throne, is not something more than a mere corporation with power to make bye-laws; whether it is not an essential and component part of the Constitution of the realm, whose independent powers, judicial and

legislative, are even more sacred and inviolable than the power and jurisdiction of the highest civil and criminal courts of the country. These may be changed or taken away, as they have often been. The others cannot be invaded in any vital point without a direct breach of what is fundamental and essential in the political state of the United Kingdom."

In the case of the Lethendy interdict, Lord Moncreiff regarded the position of Mr. Clark as altogether different from that of the presentee to Auchterarder, and represented the difference as being of a kind to prevent the Court having the same jurisdiction which they had assumed in the Auchterarder case. His lordship yielded to the authority of the House of Lords in that case, however much he dissented from their judgment. But he declined to go further than what its terms required. He could not admit the construction of it which would make it extinguish the whole rights and power of the Church Courts as he had hitherto understood them, and as they were declared in the existing statutes. For to admit *that*[1] construction, he thought, was the same thing as saying that it had overturned the constitution of the Church of Scotland. He, consequently, maintained that the procedure of the Presbytery of Dunkeld in inducting Mr. Kesson to the pastoral charge, notwithstanding the interdict, was a purely ecclesiastical pro-

[1] The italics are Lord Moncreiff's.

ceeding, with which it was incompetent for the Court of Session to interfere.

The Stewarton case appeared in the view of Lord Moncreiff to derive its great importance not so much from the character of the facts involved in it as from the course of argument employed and the opinions expressed with respect to it. These rendered it, in his apprehension, by far the most important cause which he had yet been called upon to judge of. He felt that it required him to exhibit elaborately his views of the jurisdiction belonging to the Church, in consequence of the opposite views which had been announced.

He expressed himself as follows :—" I had believed it to be no subject of doubt or controversy that the Presbyterian Church of Scotland, as originally constituted in its early history, and as finally established unalterably by the statutes of the Revolution and the union of the kingdoms, possessed, by its Courts of General Assemblies, Synods, Presbyteries, and Kirk-Sessions, framed and modelled within it, power and jurisdiction, both judicial and legislative, in all matters spiritual or ecclesiastical, absolutely independent and exclusive, except as limited by express enactments of the Legislature not here in question, and which no Civil Court, itself created by the State for other ends, could touch or control. I believed this to have been so settled as at last to have become a fundamental, sound, and unalterable principle in the

constitution of the State, by a series of statutes more precise, more stringent, and, in the end, more broad and unambiguous than the laws which have created and have defined any other jurisdiction within the kingdom."

(He added that though he was well aware the claims of the Church to this independent position—deemed by our forefathers as essential to its existence and usefulness—had been often objected to, and might still be distasteful to some who formed an erroneous estimate of its character, he had never, till the discussions of the present day arose, heard it denied as a matter of fact that such was the law of the constitution.)

"The very point of struggle throughout the seventeenth century had been, whether the Church of Scotland should stand as independent, and whether its Courts should be supreme in all matters ecclesiastical. If the Revolution settlement did not accomplish this, it was not the Revolution for Scotland, which all the people of that kingdom believed it to be at the time, and have ever since believed it to be." "The essential thing (in that settlement) is, that the only government of the Church, and the sole power in all matters ecclesiastical, are declared to be in the General Assembly and other Church Courts, and that any supremacy in the Crown is abrogated as inconsistent with that settlement. Nor is there in any of the statutes the slightest hint that any other court constituted by the Crown for civil purposes

shall have any right or power to interfere to control the acts or judgments of the exclusive ecclesiastical jurisdiction. To my mind, it is a most perilous state of things, if such fundamental laws are to be now either denied in their plain meaning, or frittered away in minute criticism."

"As I read the statute-book, I find no enactment which creates any such jurisdiction" (that is, a pre-eminent power to keep other courts within their legitimate action), "*but exactly the reverse, in the most peremptory and commanding terms which could be invented.* Whatever the Church may be, the Court of Session is certainly the creature of the State absolutely. But it does appear very strange to me that any attempt to deny its jurisdiction is represented as a denial of the power of the State."

"In the constitution of the Court of Session by the Act 1537, c. 36, we look in vain for anything like a primary or secondary jurisdiction in matters ecclesiastical, or any power to control the sentences or proceedings of the Ecclesiastical Courts. It is in the strictest sense created by the State for special purposes, which are defined in terms directly exclusive of any such jurisdiction. The judges of it are appointed to sit and decide upon all actions civil."

In the conclusion of his opinion, Lord Moncreiff asks whether the acts now complained of were indeed "the

flagrant wrong which must find a remedy by breaking down the bulwarks which the statutes of the realm have set up between the supreme Court of the Church and every other jurisdiction of the kingdom." "He saw," he added, "that the principle about to be acted on by the Court might break down all the independence, and with it all the usefulness of the Church in the most sacred things;" and he closed by the expression of his "most deliberate and most decided opinion against a principle which tended to the dissolution or entire mutilation of that Church" by which Scotland had been blessed.[1]

Afterwards Lord Moncreiff, on the question of the reduction of the ecclesiastical sentence of deposition in the Strathbogie case, made the following remarks:—"To say that we admit the independence of the Church in all spiritual functions, and then to qualify this by the condition, *provided they be rightly administered*,[2] appears to me a contradiction in terms. For that is not a supreme and independent court at all, the exercise and administration of whose functions or jurisdiction is subject to the control of some other court. To say that you admit absolutely the independence of the Church Courts

[1] See Report of Stewarton case by J. M. Bell; Robertson's Report of Auchterarder case, and of Lethendy case; also Dunlop's Reports of Culsalmond and Strathbogie cases.

[2] The italics are Lord Moncreiff's.

in spiritual affairs, but that, if it can be stated that they have, in the precise matter of the deposition of a minister abused or perverted their powers, this Court can interfere to reduce their sentence, is first to grant that which, by the statutes, ought to exclude any such interference, and then to contradict it."

He represented the contradiction as consisting, first, in the circumstance that even the judgment, in its own department of a confessedly supreme court, may, by the theory maintained, be such as to deprive it of its independence; and secondly, in the circumstance that by the same theory it belongs to the Court of Session to set aside a sentence of deposition *quoad spiritualia*, pronounced by the supreme independent court.[1]

Lord Jeffrey.

Lord Jeffrey rested his opinion in the Auchterarder case, so far as the question of jurisdiction was concerned,

1*st*, Upon the ground that no civil interest was properly brought before the Court for judgment; and secondly, upon the ground that the proceedings complained of were properly ecclesiastical, as to which the Court had no power to adjudicate.

I extract the following sentences from his statement:—

"I do not think the jurisdiction of this Court can be maintained even if it were assumed that, in relation to

[1] See Dunlop's Report of Strathbogie case.

the general statutes of the realm, the proceedings complained of had been *ultra vires* of the Church Courts, provided they were still within their own province, and involved no assumption of civil jurisdiction."

"Something has been thrown out as if this Court possessed some supereminent and peculiar power of correcting or declaring the errors or excesses of power by other independent judicatures. I am unable to discover the traces of any such prerogative of extraordinary authority in the Court of Session."

"Though what the Presbytery did, or refused to do, may *in its consequences*[1] affect the civil interests of the pursuers, this can afford no ground for saying that they adjudicated upon such interests, or that a Civil Court may interfere with proceedings which were in other respects within their ecclesiastical province. There can hardly be any proceedings of any court which will not in this way affect civil interests."

"It is plain, therefore, that *this indirect effect*[1] of an ecclesiastical proceeding never can touch the real character of the proceeding, nor enter at all into the question of jurisdiction."

"I conceive there are properly *but two things*[1] which are under the jurisdiction of the Civil Courts, and that all the rest are exclusively for the adjudication of courts ecclesiastical; and these two are the right of *Patronage*,[1]

[1] The italics are Lord Jeffrey's.

or presentation, and the right to the *stipend*[1] and other temporalities."

Speaking of the original settlement of articles of religion and Church government as proceeding from the Legislature, Lord Jeffrey said :

"It must be *ultra vires* of the Church to innovate materially upon these. But they are not left on that account to the cognisance of Civil Courts of law; and if any question arise, either as to their interpretation or any alleged violation of them, I apprehend it to be certain that it is in the Church Courts alone that they can be determined, and that *we* can in no such case interfere."

"My opinion is, that when they have *rightly sustained the presentation of the true patron*,[1] the proceedings of the Presbytery are beyond the control of the Civil Courts."

"When a supreme court falls into error, I know of no remedy but in the Legislature; and conceive that nothing could be more unconstitutional than to allow one fallible tribunal to trespass beyond the field of its proper jurisdiction to remedy or to *declare*[1] an excess of power, though within its own jurisdiction, by another. If it had encroached upon our province as well as gone beyond its own, the case would have been different."

In the case of the Lethendy interdict, Lord Jeffrey

[1] The italics are Lord Jeffrey's.

held that the first Auchterarder judgment did not go so far as to involve the assertion of power in the Civil Court to order or prohibit the admission or induction of a presentee. He therefore went along with Lord Moncreiff, in finding that the Presbytery of Dunkeld ought not to be censured.[1]

On the Stewarton case he spoke in the terms which I have extracted on this and the next page :—

"The sum of my opinion is, that the matters here in question are *purely ecclesiastical*,[2] and involve no civil interest whatever; and that as this Court can dispose of civil interests alone, so it has no jurisdiction in the case before us. I do not think it necessary to make out that the Church has in this case acted at all points conformably to the limitations or conditions which the Legislature may have attached to the powers bestowed. Even if it had exceeded those limits, my conviction is, that this Court would have no power to interfere, unless it had not only gone beyond its own province, but encroached upon the precincts of ours."

"To speak of the *jurisdiction*[2] of the Church as standing or consisting in preaching of the Word, correction of manners, or administering of the sacraments, is to speak unintelligibly in any other sense (that is, than the sense of power to *make* laws regarding them); and the

[1] Robertson's Reports.

[2] The italics are Lord Jeffrey's.

meaning I take very plainly to be, that it should have power (*jus dicire*[1]) to make and announce such laws as it might think necessary for the attainment of these objects; and, *inter alia*,[1] to settle by what manner of persons and to what congregations the Word should be preached and the sacraments administered."

"I agree with Lord Moncreiff, that the only just measure we can now take of the powers really given, and intended to be given, by general words in the statutes, is to be found in the powers actually and openly exercised by the Church at and before the time when validity and legality was distinctly given to them."[2]

The three judges whose conclusions I have now adduced, were undoubtedly esteemed as very high authorities by their immediate contemporaries. For the sake of younger readers, I may mention that the two first named were elevated to the Bench by their political opponents, under the Duke of Wellington and Sir Robert Peel, long previously to the time of the Reform Bill, through the force of their high standing at the Bar, and their eminent legal attainments. The third, Lord Jeffrey, after serving the Reform Government as Lord Advocate for nearly four years, was appointed a judge in 1834, and soon acquired a great judicial reputation,

[1] The italics are Lord Jeffrey's.

[2] Report by J. M. Bell and others.

which went on increasing till the day of his death at a very advanced age. The clear declarations of opinion by these eminent men told upon the preparation and terms of the Claim of Right, and upon the confidence of the Free Church in the constitutional ground assumed by her at and after the Disruption.

Lord Cockburn.

This distinguished man had an extraordinary talent for seizing upon and popularising the salient points of a cause which interested him. He could do more in that way than any one of his associates. The Free Church has great regard for his memory, and has greatly esteemed his expressions of sympathy. I have a very grateful recollection of him in his later years. But I feel that he did not go quite so deeply or minutely in his judicial statements before the Disruption into the agitated legal questions, as Lords Fullerton, Moncreiff, and Jeffrey did; and I know that his opinions, therefore, did not influence the declarations and movements of the Non-intrusion party quite so much as theirs, nor command quite so much attention in the Free Church for some years of her course. The recent and posthumous publication of his striking observations has given a peculiar attractiveness to his ideas. But I freely admit that, at the commencement of his opinion on the Stewarton case, he made a concession which does not altogether harmonise

with the constitutional doctrine maintained by these other judges respecting the thoroughly co-ordinate jurisdiction of the Church Courts; and which, consequently, does not fully reach the point contended for in our Claim of Right.

He not only agreed with Lord Fullerton in the principle that, as an Establishment, the Church has no power, and especially no jurisdiction, beyond what the State has been pleased to confer upon it, but he differed from Lord Fullerton by admitting, also, that cases might arise in which it might be necessary for that supreme civil tribunal, to whose interpretation of their legal rights the highest authorities in the State must submit, to declare the boundaries between the civil and the ecclesiastical powers; and that, when a proper occasion for such an exercise of its civil jurisdiction shall occur, the decision of the court must be received as conclusive. Still, the extracts from his judgments, which I here subjoin, lend decisive support to the Free Church cause, and it is difficult to reconcile some of them with the admission referred to.

On the Auchterarder case, he said, with respect to its *principles*—

"They involve the subsistence of the General Assembly as a supreme and independent ecclesiastical authority."

"My opinion is, that in doing what the Court is now asked to condemn, the defenders (that is, the Presbytery)

were acting in a character and in relation to a matter in which, *even though they were wrong,*[1] this Court has no jurisdiction to set them right."

"The whole thing is purely spiritual. Your lordships may look into this matter, though spiritual, as into any other matter, in so far as is necessary for the disposal of a civil interest."

"The demand is, that this civil interest shall be reached by your lordships controlling the Church in the induction itself."

"Let the Church be ever so wrong in what it has done, I have no idea that this Court has the power to give redress by taking the admission out of the hands of the Church, or by making the Church in the admission a mere instrument in the hands of the Court."

In the Lethendy case, Lord Cockburn thought that the decision of the House of Lords in the Auchterarder one obliged him to decide against the Presbytery. Referring to his opinion in that former case, he said—

"I thought then, and were it not for that case, I would think still, that *the whole process of induction,*[1] from first to last, had been placed by statute in the hands of the Church, and that, leaving patrimonial interests to the protection of the ordinary courts of law, everything touching the constitution of the pastoral relation was entirely spiritual."

[1] The italics are Lord Cockburn's.

"But I feel that I cannot maintain this now."

After showing what he held to be the result of the Auchterarder decision, he added the significant sentences:—

"This certainly leaves few traces of what I have hitherto been always accustomed to think the Church of Scotland. I am far from saying that it extinguishes or even changes that constitution; because I can admit the Church to have no constitution but what the law, as delivered by the Courts gives it. But it so essentially changes what I have till now believed to be its constitution, that I cannot wonder at a Presbytery committing the mistake of walking by the old light."

With reference to the Stewarton case, he said—

"Your lordships may adjudicate as to any civil matter that may be implicated, even though this should imply a total separation of the temporalities from the spirituality. But this is not what is now demanded. Your lordships are about to go into the Presbytery, and to control that body as a Church Court in its ecclesiastical act. It is this redress that I think you have not jurisdiction to give."

Lord Cockburn also made in the course of his statement on the same case, a remarkable declaration regarding the view he had taken in the Lethendy case.

"In that peculiar case," he said, "I thought that the Court was warranted in interfering. Subsequent reflec-

tion, however, has made me doubt this; and I am certain that I at least expressed myself far too strongly."

In the case of the Strathbogie reduction, he made the following representations :—

"If a person skilful in drawing modern statutes were to be employed to frame one for the express purpose of excluding the jurisdiction of this Court from doing what is now demanded, I do not see how he could do it more clearly than this jurisdiction is already excluded by the Acts of the Scottish Parliament on which the constitution of the Church rests."

He represented to the Court that a course of undeviating practice had made it evident that their predecessors had only required evidence of deposition by the Ecclesiastical Courts with a view to civil results. It might possibly be, he said, that they had sometimes refused civil effect to depositions. But this was the first instance in which the Court had been asked to control the action of the Church in deposition, or to defeat or disregard a deposition as to all effects. This, he maintained, was entirely an original attempt. A court, he thought, which had no jurisdiction in a matter, could not acquire it because another supreme tribunal had within its peculiar and exclusive sphere misconducted itself.[1]

[1] Reports referred to before.

Lord Ivory.

This clear-headed and accomplished judge declared his adherence to the doctrine of co-ordinate jurisdiction, as maintained by Lords Fullerton, Moncreiff, and Jeffrey; and he supported it by a remarkably distinct and powerful opinion on the case of the Strathbogie induction.

He exhibited at the outset three fundamental points —he proved, first, that if courts be truly co-ordinate, a conflict can only come where a narrow line of separation occurs between their spheres; that neither the one nor the other can enforce its view upon the other, because to allow its doing so would be to cut the knot of a difficulty in place of solving the difficulty; and that each co-ordinate court may and must enforce its view upon its own officers and members. He proved, secondly, that the existence of such co-ordination in courts had been recognised in Scottish law, remarking that an assertion by the head of the court as to the necessity of one pre-eminent and regulating tribunal in every civilised country had given men courage to say, without adequate ground, as if it were a matter of course, that there must be here, as well as elsewhere, one such supreme, regulating tribunal; but that the idea was really a new and startling one. His proof lay in quotations from Lord Stair, who speaks of various coexisting, supreme, and independent judicatories, and says that the Court of

Session has "but a limited jurisdiction" to interpret statutes in civil causes; emphatically adding that this interpretation can have no other effect but in relation to the said causes, without prejudice to other judicatories to interpret the same as they are convinced. Lord Ivory made it manifest that the Court of Session had not, by the terms of its institution, been made a supreme, universal, and exclusive arbiter, and that no mastery over all other courts had been conferred upon it. He proved, thirdly, that as the Church is admitted to have a supreme and exclusive jurisdiction in her own department, the principles previously explained by him must preclude any other court from interfering with the supreme court of the Church, and must leave that court free to interpret statutes for its own guidance. Thus it appeared to him that the Church was now claiming nothing more than other independent courts. He proceeded as follows:—

"Thus understood, it has ever appeared to me that the claim of the Church Courts is irresistible, and that the counter pretensions by which it has been met in behalf of the Court of Session, as the supreme civil court of the land, rest upon no foundation either of principle or authority, but are altogether of modern and very recent invention. As to the more ancient, and hitherto undisputed and received doctrine, which is now said for the first time to be 'exploded,' through the more careful

and accurate deliberations of these our own days (though not exploded, I fear, without some of the violence which attends other explosions), I must say that, in a question of constitutional law and history like the present, it stands still recommended to me by its very antiquity. In the face of nearly 300 years of unbroken recognition of the doctrine said to be exploded, I am jealous, I must confess, of the new reading. *Contemporanea expositio optima interpres.*[1] At all events, it is hardly reasonable in the circumstances to deal with a doctrine which had thus stood the test of ages, as if that doctrine, and not what has now been substituted in its place, were the innovation. For my own part, I am willing to deal with the new doctrine on its own merits; but when I find that doctrine fundamentally *rested in the face of all precedent and principle,*[2] upon such ground as the assertion of a supreme, universal, and privative jurisdiction in the Court of Session to read the statute and common law of the land—not for itself merely, but for other tribunals not less independent in authority than itself—and even to compel these tribunals to adopt that reading as the measure of their own co-ordinate rights, I cannot help taking my stand by the ancient landmarks, and can be no party to what I must consider an *unconstitutional encroachment* upon them."

[1] The italics are Lord Ivory's.

[2] These italics are mine.

The quotations and references which I have selected from the utterances of five judges are far more than sufficient to show that the assertion as to the Free Church constitutional doctrine having been recognised both in the statutes and in the old judicial practice, was no ill-considered suggestion by the authors of the Claim of Right, but arose from the carefully elaborated and deliberate judgments of men who were confessedly distinguished ornaments of the Scottish Bench.[1]

Lord Glenlee.

I have reserved my notice of the view taken by this highly esteemed and acute judge, not from thinking it of less importance than what is furnished from other quarters, but because it was unique both in the circumstances of its delivery and in its own nature, and because from his having been the oldest judge on the Bench, and from his familiarity with ideas formerly prevalent, it provides a good introduction to the question how far our doctrine of an absolutely co-ordinate jurisdiction is borne out by the legal decisions and practice of the last century.

Lord Glenlee was prevented by illness from hearing the opinions of other judges in the Auchterarder case before delivering his own. A very peculiar impression was thus made, when he was found taking for granted —as almost axiomatic—the very doctrines which the

[1] Dunlop's Report on Strathbogie Reduction.

majority of the Court had denied. Speaking of the words regarding Patronage in the Act 1567, he says:—

"It appears to me that these words do not reserve the right of Patronage generally, but that the Act simply reserves the right of presentation; and then goes on to point out how that is to be effectuated; declaring in precise and positive terms that an appeal may be brought to the General Assembly, and that thus their judgment shall end the cause. My idea is, that it was the *euixa voluntas* of the Legislature, by this Act, to confine the right of patrons to a mere right of presentation; and in pointing out the course to be taken by them in order to effectuate this right, it declares that the cause may be appealed to the Assembly, where it must take end by the judgment of that Court."

He afterwards intimated a decided opinion that, by the terms of the statutes, and the known laws of the Church when the statutes were passed, the word "qualified" must include the question of a man being qualified for the particular charge. "I think," he says, in a previous sentence, "I may take for granted that here (that is, in Scotland) no person can be intruded on a congregation contrary to the will of the congregation." It is evident that he also took for granted that the decision of the whole question of a person being qualified, according to this standard, lay exclusively with the Presbytery, under reservation of a right of appeal to the

Assembly, whose judgment was to be absolutely final. He thought that the *euixa voluntas*[1] of the Legislature had fixed both the points raised by the Auchterarder case in favour of the Church—that is, both the exclusive jurisdiction of the Church in the matter, and the principle of Non-intrusion, as enforced by the Veto Law. He held the principle of the old law and practice to be, that a Presbytery was not entitled to disregard a presentation by a lawful patron, but was bound to receive and act upon it, according to the rules of the Church; but that these rules warranted the application of the principle of Non-intrusion in the exercise of an independent jurisdiction.[2]

Lord Glenlee had no opportunity of expressing his sentiments with respect to any subsequent case. But the character and substance of his Auchterarder speech are thoroughly in unison with the declarations of Lords Fullerton, Moncreiff, Jeffrey, and Ivory, while in important points they correspond to the testimony of Lord Cockburn.[3]

4. Legal and Judicial Practice on the Jurisdiction Question during the Last Century.

The judgment of Lord Glenlee goes a great way to prove what must have been the prevalent ideas upon this subject entertained by the Court in his younger days.

[1] The italics are Lord Glenlee's.
[2] Robertson's Report.
[3] Appendix, No. V.

Lord Cunningham (who deserved credit for the honest simplicity, as well as for the distinctness with which he avowed his adverse sentiments), when speaking on the Auchterarder case, admitted the statement of Lord Jeffrey, that none of the cases that came before the Court during the last century were brought forward at the same stage, or in the same circumstances, though he did not see the legal distinction which prevented Lord Jeffrey from applying their results against the pleas of the Church. But when dealing as Lord Ordinary with the case of the Strathbogie deposition, he had advanced to a stronger judgment of rather a striking character. It had been suggested by the minority of the Court that the old cases were disposed of on the principle laid down by Lord Kames, that, even when a Presbytery acted illegally, there was no other remedy except the withholding of endowments, and that the ecclesiastical sentences must stand if confirmed by the Assembly. But Lord Cunningham, in his note as Lord Ordinary, declared that he held this *dictum*[1] of Lord Kames to be now *exploded*,[1] through the more careful and accurate deliberation of recent times. This idea, deprecated, as we have seen, by Lord Ivory, involves an important admission. I mean the admission that the minority were right in their estimate of former judicial conceptions, and that the doctrine of the majority was an innovation.

[1] The italics are Lord Cunningham's.

For a *dictum* could hardly be spoken of as *exploded* if it had not prevailed at a former period.[1]

The same admission was virtually made by the Lord President in his speech on the Auchterarder case. That speech obtained approbation in the House of Lords for its judicial character. From its own point of view, it was both judicial and honest. It resembled that of Lord Glenlee in its conciseness, in its decisiveness, in the speaker not having heard the opinions of other judges, and in its taking for granted what other judges endeavoured to disprove by elaborate argument. Lord Glenlee took for granted the chief things contended for by the Church as things fixed by old peculiarities of Scottish law. The Lord President took for granted certain general principles which are received as fundamental by the legal mind of England, and the erroneousness of some contrary ideas which had influenced the judicial mind of his predecessors on the Scottish Bench. But this characteristic of his judgment had the effect of conceding one-half of the argument on which the Claim of Right is based.

He knew that he could quote no case in which, during the last century, the Court of Session had given orders to a Church Court to take on trial or admit a presentee, or in which they had reversed a settlement of a minister so far as the pastoral office was concerned. But he said—

[1] Reports referred to.

"The cases are numerous in which this Court found the patron entitled to retain the stipend as in a vacancy. Now, the Court could not find this without a thorough investigation and inquiry into the proceedings of the Presbytery, and a judgment that in the settlement that body had done wrong—clearly establishing the control of this Court, even in cases purely ecclesiastical."

He thus admitted that his predecessors had gone no further than to regulate the right to a stipend, while he assumed, simply as a matter of inference and general principle, and not of direct Scottish precedent, that the Court was entitled to control the Church. He did not recognise the distinction exhibited by more than one of the minority between a right of investigation with a view to civil consequences, and the same right with a view to direct control. But the recognition of the fact that the "numerous cases" referred only to stipend, is a virtual admission of what the minority maintained. His admission, however, goes a great deal further. For he went on to say—

"We are freed from a difficulty, which seems to me very *unaccountably* to have embarrassed our predecessors. I mean that no other person has been presented and inducted by the Presbytery into this living, so that if we are of opinion that we ought to give redress, we can do so without interfering with what our predecessors seem to have considered as a sacred character which they could

not touch or recall." "How our predecessors came to be of opinion that a man's ordination should convert an illegal appointment into a legal title to the very office into which he had been thus illegally intruded, *I cannot understand.* In my humble opinion, this Court, having found his admission to be wrong, should have ejected him from the benefice, just as they would eject a tenant or any man who, on a title found to be illegal, had got into possession of a house or a farm."[1] Here is a plain and honest acknowledgment that a view associated with the sacredness of spiritual action by the Church as to the pastoral office, had prevented former judges from doing what the majority of the modern judges, through the influence of a new light and the consequent "explosion," happily criticised by Lord Ivory, were now prepared to attempt.

The view taken of the old cases by the minority was mainly founded on the distinction I have referred to, which they held to have always prevailed in legal practice and decisions previously to the recent discussions. I mean the distinction between finding an ecclesiastical judgment to be *illegal*, so far as civil effects are concerned, and assuming a right to correct the illegality by controlling the action of the Church.

Lord Fullerton said: "In every one of the cases the jurisdiction of the Court was necessarily let in by the

[1] Robertson's Report.

existence of a competition of civil or pecuniary rights." And he dwelt emphatically on the fact that, though the Assembly had undoubtedly the power to revoke an induction to the pastoral office, no attempt was ever made to compel their doing so, even in instances where it evidently would have been made, had there been the slightest notion that such compulsion would be competent.

Lord Moncreiff maintained the same view of the former practice, and said that not one of the cases gave the slightest sanction to the contrary plea.

Lord Jeffrey said: "In all the cases hitherto where the Civil Court has interfered, the Presbytery had manifestly usurped a civil jurisdiction, and had judged erroneously upon matters which it was the privilege of the Civil Courts alone to determine." Speaking of cases in which Presbyteries may have inducted pastors while there was a dispute as to the right of patronage, he said: "In such cases Presbyteries have assumed a jurisdiction *extra provinciam*, and sustained or rejected presentations so as to explicate their own clear right to examine and induct, at the peril of having all patrimonial interests adjudicated according to the final judgment of the only binding authority. What the Civil Court alters or disregards is only what was erroneously decided by the Church Court upon the civil question of patronage. The actual induction remains untouched and unquestionable

by us." Referring further on to the induction of presentees upon unlawful presentations he said: "The Civil Court has always disregarded such inductions as giving right to the temporalities." "If being '*ultra vires*' gave a jurisdiction *quoad omnia*, how is it that in most of these cases the presentee once inducted was yet allowed to hold the spiritual function of parish minister, and to prevent the induction of any other person, while he himself was not entitled to any part of the temporalities." "The only answer is, because it was felt and acknowledged that the Civil Court only adjudicate upon what was properly civil."

Referring generally to the old cases, Lord Jeffrey added, "In every one of these cases the Presbytery had objected to the title of the patron. I am not aware of any case whatever in which this Court has been asked to interfere where a presentee was rejected on grounds altogether apart from the validity of his presentation and emerging in the course of regular ecclesiastical proceedings."[1]

The references now made to statements from the Bench on the Auchterarder case, are fitted to create a strong presumption in favour of what is maintained in the Claim of Right on the subject of legal precedent. I have introduced them as an important preliminary to a

[1] Robertson's Report of Auchterarder Case.

careful examination of the particular cases enumerated in that document. It is needful to look at these, not only as they are adduced by its authors, but also as they were founded on by the minority in the Court of Session. Previously to the preparation of the Claim, the public mind had become familiar with the argument respecting them to such an extent as to render special explanation of them unnecessary beyond such distinct allusion as might lead any future inquirer to identify them.

The mention of them occurs in illustration of the fifteenth paragraph. Before adverting to its terms, it is desirable to notice what the only kind of description is which can truly correspond to the conception of the old legal practice in Scotland that was entertained by Lord Fullerton and the judges who agreed with him. If a veritable narrative of what took place in the last century before the Court of Session had presented a succession of instances in which that Court had continually refused to grant what was actually pressed upon them, the legitimate inference would have been, that the law regarding the kind of applications had not been fully settled, and that there must have been specific peculiarities in the individual examples which prevented them being considered as sufficient precedents to deter from new actions in the same direction. The evidence really required to support the pleas of the Church was evidence of a legal practice, both in the procedure of the Court and in the advice of

counsel, which would indicate a settled conviction as to what was legally competent. The general statement, therefore, in the Claim of Right, cannot be fairly read as indicating a positive judicial refusal in every instance quoted to interfere with the absolutely co-ordinate jurisdiction of the Church. It must be looked at as pointing to a state of practical action, both on the Bench and at the Bar, which proves what the legal doctrine was understood to be. The fact that parties were deterred by good advice from asking what the Court could not be expected to grant, is a confirmation of that doctrine greater in value than a repetition of positive judicial declaration, provided there be any proof of such declaration at all.

Let the terms of the fifteenth paragraph be considered in this point of view. That paragraph does not state, as has been represented, that in every one of the examples which follow, the Court of Session *refused* to interfere with the peculiar functions of the Church. It does not imply that in them all it had opportunity for thus refusing. The idea is quite unreasonable that such was the intention of the paragraph, and it does not convey that meaning literally and grammatically. People familiar with the controversy in 1842 understood the subject too well to put such a construction upon a condensed summary of extended expositions. The authors meant, and were understood to mean, just what the judges in the minority meant.

The chief statement of the paragraph is, that even in instances of a Presbytery acting *ultra vires* in rejecting presentees and admitting other persons to the pastoral charges, the Court of Session *never* attempted or pretended to direct or coerce the Church Courts in the exercise of their functions. This negative averment is the only one which extends to every one of the examples afterwards quoted. The paragraph further asserts, that the Court during the century after the passing of Queen Anne's Act, limited their decrees to the regulation and disposal of the temporalities, it being manifestly intended, not that in every instance they were asked to do more, but that in no instance whatever did they do more. The last clause is in these words—" Refusing to interfere with the peculiar functions and exclusive jurisdiction of the Church." The fair interpretation of the clause is, that while the Court never so interfered, they positively refused to do so when the idea of such action was in any form suggested to them. To suppose the meaning to be that a positive refusal had been reached and realised in each case is inconsistent with an adequate comprehension of the subject dealt with.

The first case appealed to in support of the general statement as now explained is that of Auchtermuchty. The history of it, as given both by Mr. Whigham and by the Dean of Faculty, the counsel against the Church in the Auchterarder case, is such as to show that the

patron and presentee would have taken every advantage toward having an illegal induction interdicted or reversed that the law could be expected to afford them. They endeavoured to prevent the action of the Presbytery by *advocation*, which the Court on consideration found to be incompetent. Why did they not afterwards apply to have the settlement reversed by authority of the Court of Session? They made such application to the commission of Assembly, who acceded to it. The next Assembly having superseded that judgment of the commission, why did the patron and presentee not ask the Court of Session to compel the reversal? Why was the action before the Court confined to a demand for the stipend on the part of the patron? The obvious answer, without proof to the contrary, is that they were advised to that effect, on the ground that any further application would be found incompetent. Two judgments of the Court are reported—one pronounced on the 13th of February, 1735, and the other on the 14th or 15th. The terms of the first are: "The Lords found that the right to a stipend is a civil right, and therefore that the Court have a power to cognosce and determine upon the legality of the admission of ministers *ad hunc effectum*, whether the persons admitted shall have right to their stipends or not; but continued the rest of the cause till to-morrow."

The second judgment is as follows:—"The Lords

found that a Presbytery refusing a presentation duly presented in favour of qualified persons against which there lies no legal objection, and admitting another person as minister, the patron has right to retain the stipend, as in the case of a vacancy, and therefore finds the reasons of the suspension relevant, and supersedes advising the other points till Tuesday next."[1]

The suspension related simply to the payment of stipend, and the reserved points concerned the validity of the title to the patronage, which was determined afterwards in the patron's favour.

The words *ad hunc effectum* are printed in italics by the contemporary reporters, and prove that the Court put emphasis upon them as indicating a limit to their power. They had found an advocation incompetent, and the only thing now which the parties were advised to ask for, or which the Court found competent, was a decree as to the stipend. The case is a manifest example of what is affirmed in the Claim of Right, and of that special discrimination by which, in those days, both advising counsel and the Court of Session carefully marked the difference between what they thought competent and what they thought incompetent—a discrimination which, in application to the subject, Lord President Hope confessed himself unable to understand.

[1] Moncrieff *v.* Maxton, 15th February, 1715; Fol. Dict., 2-47; Mor., 9909; Elchie's Pat. 1.

Lord Fullerton, speaking of the case, said—

"Nothing can be conceived more guarded than the judgment ascertaining and defining the principle upon which the competency of such an inquiry (that is, an inquiry into the legality of the induction) was sustained. One might think that it was worded for the express purpose of guarding against the doctrine now maintained on the part of the pursuer."

The Solicitor-General (Rutherford) had previously maintained, with respect to the same judgment, that it was impossible "to figure a case in which the Court confined itself more exclusively, and with more caution, to its separate jurisdiction."

Lord Moncreiff pointed out that there was "no attempt to dispute the right of the person inducted to be minister *quoad spiritualia,* or to make the presentee the minister." "No such question," he said, "was for a moment thought of; the patron merely claimed a right to retain the stipend."

The words in the Claim of Right are in entire accordance with this representation, as follows :—

"In the case of Auchtermuchty, where the Presbytery had wrongfully admitted another than the patron's presentee, the Court found 'That the right to a stipend is a civil right; and *therefore* that the Court have power to cognosce and determine upon the legality of the admission of ministers *in hunc effectum* whether the *person*

admitted shall have right to the *stipend* or not;' and simply decided that the patron was entitled to retain the stipend in his own hands."

The cases next taken notice of are those of Culross, Lanark, and Forbes, in these terms:—

"So, also, the same course was followed in the cases of Culross, Lanark, and Forbes; in reference to one of which (that of Lanark) the Government of the country, on behalf of the Crown, in which the patronage was vested, recognised the retention of stipend by the patron as the only competent remedy for a wrongful refusal to admit his presentee; the Secretary of State having, in a letter to the Lord Advocate of Scotland (January 17, 1752), signified the pleasure of His Majesty "directing and ordering his lordship to do everything necessary and competent by law for asserting and taking benefit in the present case of the said right and privilege of patrons by the law of Scotland to retain the fruits of the benefice in their own hands till their presentees be admitted."

The circumstances of the judgment in the case of Culross were precisely similar to those in that of Auchtermuchty. A bill of advocation for preventing an induction in opposition to a presentation found eventually to be valid was presented, but refused as incompetent; and thereafter the parties were advised to apply only for a recognition of the patron's right to the stipend, in which application they were successful. Lord Fullerton declared

it to be of exactly the same kind with the preceding one, involving nothing more than a competition for a pecuniary right, and originating in an erroneous judgment of the Presbytery regarding a title to patronage. Lord Moncreiff treated it in the same manner. It is quoted simply as an illustration of the general fact, that an application for the stipend was then understood by lawyers to be the only competent resource against an illegal induction to a pastoral charge.[1]

There is a variety of evidence to the same effect in connection with the case of Lanark.

In consequence of competing claims to patronage, Dr. Dick was inducted to the pastoral charge, on the footing of a presentation which was afterwards found to be the wrong one. It is remarkable that the junior counsel against the Church in the Auchterarder case, when commenting on the Lanark decision, admitted that the Civil Court could not *unloose* the spiritual relation constituted by the spiritual act of ordination; showing that the old ideas were not quite "exploded" in his mind, and that the new light had failed to shine upon him as much as it had on others. The Crown, as patron, claimed the stipend on account of the illegal induction to the pastoral charge. But while this was the only kind of

[1] Nov. 19, 1748.—Fol. Dict. 4, p. 49; Mor. 9909, Kilkerrin Pat. 2; Jan. 21, 1749.—Fol. D. 4, pp. 50, 54, Kilk. 3; June 26, 1751.—Fol. D. 52, Fol. 213, p. 256, Mor. 9951, Elchie's Pat. 4.

action raised, the Secretary of State, in directing the Lord Advocate as to the course to be pursued, confined himself to signifying the pleasure of His Majesty that everything necessary and competent by law should be done "for asserting and taking benefit in the present case, of the right and privilege of patrons by the law of Scotland, to retain the fruits of the benefice in their own hands till their presentees be admitted." The fact that the Secretary of State looked to no other remedy but the fruits of the benefice leads to the inference that he was not advised to consider any other remedy as competent. The expression, also, "till their presentees be admitted," indicates a belief that the remedy would in the end be sufficient, insomuch as men would not generally retain pastoral charges without the usual means of support.

This view of the ground on which the advisers of the Crown proceeded, is not only strengthened but demonstrated to be beyond question, by the terms of the pleas raised before the Court in support of the application for the stipend. After reciting the statutes which establish the patron's rights, and allow him to retain the fruits of the benefice, the argument for the Crown proceeds as follows:—

"These statutes, though suspended during the subsistence of the Act 1690, again revived when patronages were restored. Without some such constitution the right of presenting would be inept. The compulsitors of the law, which formerly took place for enforcing presentations,

were not thought so well accommodated to the genius of Presbytery, and therefore a more gentle remedy was devised by these statutes." Reference is then made, in the same document, to the cases of Auchtermuchty and Culross, as illustrating this statement.

We have thus the authority of the legal advisers of George the Second, including the Lord Advocate, in favour of the constitutional doctrine which was considered by the majority of the Court of Session in 1838 to be "exploded," but to which the minority adhered, and in favour also of the interpretation which the Free Church Claim of Right puts upon the cases of Auchtermuchty and Culross. With such evidence before us, we cannot doubt that the Court of Session was known to recognise the principle referred to, and that it acted upon that principle in the case of Lanark as well as in the other cases.[1]

Lord Moncreiff said of the two cases of Culross and Lanark that they just determined, *with difficulty*,[2] that if the Presbytery mistake where the right is, the party found to be patron may retain the stipend, though another than the presentee becomes the *minister*.[2] "They give no *right*[2] whatever to the presentee, and are quite the reverse of holding that, where a presentation is *sustained*,[2] this Court can interfere with the ecclesiastical proceedings of the *Church*[2] in the ecclesiastical duty of *induction*."[2]

[1] See Report in Morrieson's Dictionary, p. 9955, Patronage, No. 35.

[2] The italics are Lord Moncreiff's.

The case of Lady Forbes against M'William is another instance of a successful application by the legitimate patron for the stipend when a presentee has been inducted upon an illegal presentation through a mistake of the Presbytery. It is simply one of a series which proves the understanding at the Bar and on the Bench as to the appropriate remedy for such illegal action.[1]

The next example given is that in which the Court appears to have refused as incompetent a bill of *advocation,* for the purpose of preventing the admission in the case of Culross. The words in the Claim of Right are these :—

"So further, in the before-mentioned case of Culross, the Court refused" (as incompetent) "a bill of advocation presented to them by the patron for the purpose of staying the admission by the Presbytery of another than his presentee."

It may appear to some an irrelevant thing to adduce in this connection the presenting of a bill of *advocation,* because the refusal of it does not necessarily involve a refusal to interdict ecclesiastical procedure, but only a refusal to take up an appeal on the merits. For *advocation* is understood to be a form for bringing up such an appeal. There is more than one answer to this objection. Considering the character of the interferences with ecclesiastical jurisdiction, which had taken place or

[1] Morrieson's Dictionary, 9931.

were threatened at the date of the Claim of Right, it was important to show that in no form that was attempted in the last century was such interference allowed by the Court. The form of *advocation* was the only form, in which the attempt was made during fifty years previously to 1749. But, secondly, how came it to be made in that form? Why were the parties either in the Auchtermuchty or in the Culross case advised to try a bill of advocation? Why was the form of suspension and interdict not thought of? Perhaps some lawyer might give a better probable answer to these questions than I can.

It seems to me, however, that the framers of the Claim of Right were not satisfied that, at the date of these bills of advocation, the point was quite so settled as it now is, that an advocation can bring up a matter only by way of appeal upon the merits. For Lord Medwyn, in his elaborate opinion upon the Strathbogie reduction, adduced witnesses and quoted Lord Stair to prove that the Court of Session had in former times sustained *advocations* in cases where they could not determine causes on the merits, but could only judge of the reasons for *advocation;* and that on this principle *advocations* had come to them from all the criminal courts, and often even from the Justice-General, when the criminal court was in one person, on the footing that a matter was not competent to his jurisdiction. Lord

Medwyn referred specially to the case of M'Lellan, who, on the 19th of December, 1680, obtained against the Bishop of Dunblane *advocation* of an ecclesiastical process, on the ground that the Lords had a general jurisdiction directive of all the ordinary judicatures, civil or ecclesiastical, and that, though they could not judge in the first instance, they were king's counsel in matters of law. Lord Fullerton said, with respect to this representation, that though, in the times referred to, advocations were allowed to the effect spoken of, such advocations from the criminal or other courts were now held to be invalid and incompetent; so that the form of advocation was now confined to appeals on the merits from an inferior to a superior court, and the ground of this change applied to the Ecclesiastical Courts. Still, the fact that such a reference was within Lord Medwyn's reach, and seemed to him relevant, is sufficient to justify the Church in recording emphatically the circumstance that, in the middle of the last century, the Court refused to sustain advocations from the ecclesiastical courts, while there is no trace of interdicts being then substituted in their place.

We come now to the important case of Dunse, which is referred to as follows :—

"So likewise, in the case of Dunse, the Court would not interfere in regard to a conclusion to prohibit the Presbytery '*to moderate in a call at large, or settle any*

other man,' because '*that was interfering with the power of ordination, or internal policy of the Church, with which the Lords thought they had nothing to do.*'"

According to the report of Lord Monboddo, the following passage occurs in the answers for the patron to the objections raised by the Presbytery against his action of declarator with a view to the establishment of his right of patronage and his claim to the stipend if any other person than his presentee should be inducted:—"As to the Church power of examination and ordination, nothing is here concluded; the process only relates to the patron's power to present, and the presentee's right to accept; and whatever be the issue of it, it can never hinder the Church to reject the presentee upon trial, or if they please, *they may, without giving him any trial, settle another; but then that other will have no right to the stipend;* and this process, in so far as it warns the Presbytery of this, and lets them see what they are doing, ought to be reckoned a service to the Church." In this passage we have a clear intimation that the legal advisers of the patron not only did not aim at coercing the Presbytery as to induction to the pastoral office, but believed such coercion to be legally incompetent. In accordance with the view afterwards avowed and acted upon by the Crown lawyers in the case of Lanark, they carefully explained that their object was simply to prevent the appellants, or even the superior ecclesiastical

judicatories, from taking upon themselves, on a mistaken understanding of the point of right, to confer the benefice on any other person than his presentee.

The Lord Ordinary's judgment was as follows :—

"Repel the objections made to the pursuer's right, *and to the person by him presented,*[1] on account of his not having taken the oaths before his first license, in respect of the answers; and finds that the pursuer had *in possessorio* sufficient right to present, and that *the right has not fallen to the Presbytery, tanquam jure devolute; and decerns and declares.*"[1] It appears from Lord Monboddo's report that, notwithstanding the limited aim avowed by the patron in his answers, one conclusion of the summons was, "That the Presbytery ought to be discharged to moderate a call at large, or settle any other man." Probably the intention was not that the Presbytery should be coerced, but that the prohibition should prevent any claim to the stipend. But, as the Lord Ordinary's judgment ended with the words "decerns and declares," the Presbytery seem, by the terms of their reclaiming petition, to have thought that it might embrace such a compliance with that conclusion of the summons as would encroach upon their independent jurisdiction. Accordingly, we find from the report in Morrieson's Dictionary that the Court were anxious to prevent such an inference. For, in adhering to the

[1] These italics are in the Reports.

Lord Ordinary's interlocutor, they, according to that report, "found that the general words *declares* and *decerns* can go no further than the particulars determined." These particulars were confined, as we have seen, to the validity of the presentation and to the question as to the "*jus devolutum,*" and did not embrace at all the conclusion as to moderating in a call at large, nor even the conclusion as to stipend. The report shows that the object of the judgment was the same with that avowed by the patron—namely, to deter the Presbytery from inducting a person who would not have the stipend—the Court making it manifest by their language that they claimed no coercive jurisdiction.

Lord Monboddo's report thoroughly explains the meaning of anything that might be obscure in the form of the others. For he says explicitly that there were two conclusions of the declarator which the Lords would not meddle with. "The one was, that the stipend did belong to the patron till the presentee was settled. This the Lords did not think competent to be declared against the the Presbytery, who never could have any right to the stipend. The other was, that the Presbytery ought to be discharged to moderate a call at large or settle any other man; because that was *interfering with the power of ordination, or the internal policy of the Church, with which the Lords thought they had nothing to do.*" Here, then, you have not merely a refusal to interfere with the

peculiar functions and exclusive jurisdiction of the courts of the Church, but a refusal to entertain a conclusion in a summons which might *possibly be interpreted to mean such interference, even though the party disclaimed the intention of it.* Thus the advising lawyers and the Court were thoroughly agreed in maintaining the constitutional doctrine of the Claim of Right, and the thoroughly co-ordinate jurisdiction of the Ecclesiastical Courts.[1]

The last case in the series is that of Unst, and is the most decisive of all. The real facts illustrate its decisiveness more fully than the statement of it in the Claim of Right does. The words of the statement are as follows :—

"And so in the same manner in the case of Unst, where the party concluded to have the Presbytery ordained to proceed to the presentee's settlement, as well as to have the validity of the presentation and the right to the stipend declared, the Court limited their decree to the civil matters of the presentation and stipend."

Lord Dundas, the patron, and his presentee certainly had good reason to complain of somewhat sharp practice on the part of the Presbytery, who rejected his presentation, when the weather had prevented it (though issued long before) from reaching them till a few hours after the

[1] Morrieson, 9911, and Brown's Supt., with Monboddo's Report.

N.B.—Morrieson reports that, among other things it was *observed*, that the declarator nowise affected the Presbytery's power of trying or admitting a minister, and was rather a favour to them, lest by mistake the minister settled should have no legal title to the benefice.

expiry of six months from the date of the vacancy, and proceeded to the induction of another person. An action of reduction and declarator was accordingly raised. Besides concluding for a declaration that Lord Dundas had exercised his right as patron within the time required by law, and that his presentation was valid and effectual, and for payment of the stipend to him as patron till his presentee shall be settled, it asked for reduction of the minutes of Presbytery, concluding that they should be reduced, and the settlement set aside *in toto ;* and that the Presbytery should be *decerned* and *ordained* to give due obedience to the said presentation, and to proceed in the settlement of the patron's presentee.

The action came before Lord Eskgrove, as Lord Ordinary, with the whole of its conclusions. But we find from the report in Bell's Cases that the patron, " understanding that the Presbytery meant to object to the competency of the conclusions in so far as they respected the reducing or setting aside the proceedings of the Presbytery, *on the footing that the Court has no power to review the procedure of Church Courts,*" gave in a minute agreeing to depart from the rescissory conclusions, and that this being admitted, the cause proceeded on the declaratory parts of the libel.

The statement in the Claim of Right does not found, as it might have done, on the departure from the rescissory conclusions, as if it involved an opinion by the Court

that the objection to the competency was good. But I think it right to point out that when a demand is departed from, after an action is before the Court, because the other party objects to the competency, there is a strong presumption that there was a disposition on the part of the Court to sustain that objection. At any rate, the legal advisers of Lord Dundas were evidently not prepared to meet it, or to encounter the risk of defeat by it. They acted like their predecessors in the cases of Auchtermuchty, Lanark, and Dunse.

The statement in the Claim, however, is more closely to the purpose than a reference to this concession of the party would have been, important as that concession is in the general argument. For the statement represents the party as having concluded to have the Presbytery ordained to proceed to the presentee's settlement, and the Court as having limited their decree to the validity of the presentation and the right to the stipend. The report in Morrieson's Dictionary bears out this representation in an indirect manner. For the only conclusions which it records are these declaratory ones, "That the patron had exercised his right" within the time required by law; and "that the presentation granted by him in favour of Mr. Nicholson was valid and effectual." The reporter seems to have understood that all other conclusions had been departed from or rejected, and he gives the judgment as follows:—"The Lords repelled

the defences, and found and declared in terms of the libel." He must have meant in terms of the libel restricted as he had represented it in the former part of his report. The libel, according to his language, contained no other conclusions, except those two declaratory ones. In reality, however, the libel originally contained what are called *petitory* conclusions, besides the *declaratory* ones. Some of these *petitory* conclusions were also *rescissory* conclusions—that is, they required the proceedings of the Presbytery to be reduced *in toto*. These, as we have seen from the other report, were departed from by the patron through the advice given to him. But there remained another *petitory* conclusion to which the Presbytery objected—namely, that they should be *decerned* and *ordained* to give due obedience to the said presentation, and to proceed in the settlement.

This was clearly not *declaratory*. It was as much *petitory* as the *reductive* or rescissory conclusions. The Dean of Faculty in the Auchterarder case endeavoured to extract something *declaratory* out of it, but was forced to admit that it could not have any practical operation, consistently with an abandonment of the *reductive* or *rescissory* conclusions. I do not believe that lawyers will generally hold that it could be classed among the *declaratory* conclusions. The author of the report in Morrieson's Dictionary did not include it among those adopted by the Court, while the full statement of the

judgment as given by the Dean of Faculty himself, from Bell's Cases, is as follows :—" The Lords repel the defence, and find and declare in terms of the *declaratory* conclusions of the libel." The *petitory* conclusion, that the Presbytery should be ordained to proceed, could not be carried out, if the previous induction were allowed to stand. But that *petitory* conclusion still remained in the libel after the *rescissory* ones had been departed from, and therefore the Court did exactly what the Claim of Right represents in declining to adopt it, and in limiting their decree to the civil matters of the presentation and stipend.[1]

An objection was raised to the view of legal precedent taken in that document, and by the minority in the Court of Session, on the ground that on each of two occasions, at former periods, the Court of Session had found it competent to put an authoritative arrest upon the procedure of a Presbytery towards filling up a vacant charge. It was said that they had done so once in the case of Auchtermuchty in 1734, and again in the case of Kiltarlity in 1822. The reply by Lords Moncreiff and Jeffrey was that, in both instances, the Presbyteries were taking upon themselves to dispose of the civil question as to the validity of a patron's presentation, and were attempting to confer upon ministers a right to civil

[1] Bell's Cases, p. 169 ; Morrieson, 9972.

emoluments, without regard to the Court of Session's authority in relation to that civil question. Persons who, like the Dean of Faculty Hope, the Lord President, and the majority of the judges in the Auchterarder case, did not see their way to recognise the distinction so luminously exhibited by Lord Glenlee, between the civil question regarding the title to a patronage or the validity of a presentation, and the ecclesiastical question as to the mode of dealing with a presentation after it had been sustained, might honestly look upon those two instances as proving their conclusion. But the other members of the minority agreed with Lord Glenlee in holding that their predecessors had kept this distinction steadily in view, and had abstained from exercising authority in the settlement of ministers, except to the effect of either determining a right of patronage, with a view to the possession of stipend and other advantages, or of fixing that possession itself.

In the case of Auchtermuchty, the Presbytery were manifestly assuming a right to disregard the presentation altogether, and were avowedly attempting to give the pastor they inducted a title to the stipend. The Solicitor-General brought clearly out the fact, rather slurred over by the Dean of Faculty, of the refusal of the Presbytery to take steps upon the presentation having originated in objections brought forward by the magistrates and other parishioners of Auchtermuchty, that the alleged

patron had not duly produced his titles. But, on whatever ground the refusal was based, it was a refusal by them to act on the presentation at all. I do not think that an order from the Civil Court, prohibiting them from proceeding on the assumption of its invalidity, was an interference with their spiritual independence, when it was not followed up by any attempt to overturn the induction to the pastoral charge. The Dean of Faculty said that they were censured by the Court for disobedience to the order. Mr. Whigham said that they apologised. But they might have guarded themselves against the censure or the necessity of the apology if they and the minister whose settlement they were forwarding had been prepared to disclaim any intention of claiming the civil emoluments, or at least of forestalling the patron's right to them. If they were not prepared to do this, and did not do so in the manner of their action, they could not reasonably complain of an order which, on the principle of Lord Glenlee's judgment, we are entitled to suppose was simply against the assumption of civil right, and against the attempt to help the minister inducted towards the attainment of civil emoluments. The issuing of the order was afterwards found to have been incompetent, and there is no evidence to prove that, if the Presbytery could have shown that they aimed at nothing but the constitution of the pastoral relation, any coercive action against them would have been adopted by the Court.

Lord Jeffrey (in his opinion on the Lethendy case) declared that the history of this incident in the Auchtermuchty case made it a warning to the Court rather than an example to be followed. He added that the ground of the decision in the later case of Dunse, as reported by Lord Monboddo, proved the final conclusion of the Court in the last century to be, that they could give no orders as to the constituting of the pastoral relation, because that would be interfering with the power of ordination.

As to the case of Kiltarlity in 1822, that date is rather too near the era of modern enlightenment and "explosion" of old ideas, to be accepted of as furnishing a proof of what was understood to be the legal principle for a hundred years after the passing of Queen Anne's Act. The Auchterarder judgment came only eighteen years afterwards. The case was that of an interim interdict against a Presbytery proceeding, upon a presentation by a Roman Catholic patron, until the question of its validity should be determined by the Civil Court. It was recalled, because the parties applying for it had no title to do so. It was held as competent on the sole ground that "the question regarded the civil rights of patronage." The Court evidently meant the *right of the Roman Catholic patron to present.* It was against the Presbytery proceeding upon the assumption of validity in the presentation. It required them to recall any act by which they had sustained it, and to give

no more countenance to it. If the interdict had been persevered in, the Presbytery might either have simply obeyed it, or met it by resolving to proceed without regard to the presentation, and by disclaiming all recognition of it. Lord Jeffrey called attention to the fact that the Presbytery, in so far sustaining the presentation at first, had expressly reserved consideration of its validity till further advised, and that the interdict must be understood to have been only against their finally sustaining it.

Neither the prohibition of the Court in 1734 nor that in 1822 ever came into such practical operation as to give opportunity for the thorough discussion of it; so that even if either had involved more than Lords Moncreiff and Jeffrey supposed, it could not possibly be a fair precedent for opposition to a rule of legal and judicial practice, which we have seen to be thoroughly supported by those instances in which, during the last century, it was really tested. The truth is, that the manner in which the subject affected conscientious principle in ministers and elders, was better understood by governments and lawyers in former generations than it came to be afterwards. The growth of injurious tendencies in the country and the Church had, previously to the Disruption era, shaken the faith of public men in the readiness of the clergy to carry out unbending principle to its proper results. If judges and politicians had been

as familiar with perseverance and endurance for conscience' sake as their remote predecessors were, they would have estimated better the thoughts and feelings prevalent in the Church before the Disruption; they would have seen farther into the matter they were dealing with; they would have perceived the rocks against which the old statutes and the old decisions were intended to guard the vessel of the ecclesiastical constitution; and they would have acted so as to prevent the Disruption. The true explanation of the old principle of legal judgment in such cases as I have discussed, was the clear sense entertained of the necessity and fitness of that principle, for protecting the consciences of resolute Christian men, and for preserving harmony between Church and State.

Was any adequate answer given in the opinions of the judges in the majority, to the view taken of the old decisions by the minority? The clearest and most decisive was that of the Lord President. On the one hand, he boldly asserted that his predecessors had judged erroneously in allowing that action by a Presbytery to the effect of inducting a pastor without legal claim to the stipend, could not be touched or reversed by civil authority. On the other hand, he disregarded any distinction between the Civil Court having the power of investigating the particulars of ecclesiastical procedure with a view to questions of civil emolument, and their

having the power of investigating them with a view to direct control over the Church Courts. He assumed, as matter of course, that the right of investigation, asserted in the last century for the one purpose, established a jurisdiction that would include the other. He did not seem to think that there was any necessity to show authority for this inference—though confessedly it had never been acted upon, but had been expressly disclaimed by his predecessors. He simply assumed maxims that were perhaps axiomatic in the view of English lawyers, and which, I have no doubt, commended his representation to the judges in the House of Lords. I admire much the manner in which he grasped the main difficulty in his way, and summarily disposed of it without attempting to raise minute questions about particular instances in the former practice, while acknowledging the tendency of that practice in a direction which he disapproved of. But it is not surely surprising that, after studying the opinions of the minority, the Church rejected the Lord President's judgment—honest and straightforward as it was—and, adhering to old Scottish conceptions, embodied them in the Claim of Right.

Most of the other judges in the majority, who referred specifically to the former cases, followed in the line of the Lord President—taking for granted that the assertion of jurisdiction at all in ecclesiastical cases for any purpose, implied the extent of jurisdiction contended for

in the Auchterarder case. Some of them quoted cases affecting schoolmasters, and cases from the time of Charles the Second, both of which were manifestly inapplicable, and later instances of decisions against the right of Presbyteries to assume patronage, without respect at all to the difference between a total disregard of a patron's presentation and the rejection of a presentee after the moderation of a call. In general, they treated the distinction between an induction that would give a legal right to stipend and other civil advantages, and an induction which would only constitute a permanent pastoral relation, as if it had no more reality in Scotland than would be allowed to it in England. Some of them also did what the Lord President did not think it worth his while to do—they dwelt on the sist in the Auchterarder case and on the interdict in the Kiltarlity case, as if these had established the whole extent of the jurisdiction which they now claimed for the Court of Session.

There is one remarkable circumstance in the speech of Lord Gillies, proving that he felt Lord Monboddo's report of the Dunse case to be formidable. He quoted the terms of the reclaiming petition for the Presbytery of Dunse, and concluded that because it was *refused* Lord Monboddo's report must be wrong. The petition asked the Court to find in particular terms which it specified. It does not follow that because the Court refused to do so they did not find in terms consistent with Lord

Monboddo's report, or that his report of the grounds of their finding is incorrect. Lords Moncreiff and Jeffrey insisted on the authority of Lord Monboddo as sufficient to establish what occurred in the case. Lord Gillies, in proposing to get quit of his report, overlooked (what I think I have shown) that even the report in Morrieson's Dictionary leads by clear inference to the same conclusion.[1]

If the present work were written by a lawyer, he would probably have set before his readers, in the first place, his reasons for holding that the interpretation of Acts of Parliament by the authors of the Claim of Right is the correct one, and would have postponed his account of decisions in the last century to a subsequent section. But though I think that the General Assembly was obliged to interpret statutes and common law for its own guidance in its own department, I will not pretend personally to interpret them. I only profess to set before my readers the interpretations given by thoroughly competent parties, and their result in the Claim of Right. I ask persons interested in the matter to judge between these interpretations and the opposite ones. The constitutional question involved is, I think, of far too great magnitude to be held conclusively settled in the minds of Scotchmen by the opinions of a mere majority of judges, or even by the judgment of two or three English

[1] Robertson's Report.

lawyers of the highest eminence in the House of Lords. I have therefore thought it expedient to exhibit, first of all, the amount of the constitutional doctrine contended for by the minority in the Court of Session, and the support given to it by former practice, before calling attention to the paragraphs of the Claim of Right which relate to Acts of Parliament.

5. Argument from Acts of Parliament.

Act 1690, chap. 5.

The fifth paragraph enumerates six particulars of Parliamentary legislation, by which the doctrine and principle represented in the previous paragraphs as essential and fundamental, and the government and exclusive jurisdiction flowing therefrom had been recognised, ratified, and confirmed. The first is the ratification of the Confession of Faith itself in 1690, chap. 5, which ratification was regarded by Lord Moncreiff as sanctioning, the Free Church sense, and the sense admitted by the Duke of Argyll, the declaration that there is no other Head of the Church but the Lord Jesus Christ, and that He, as Head of the Church, has appointed a government therein, in the hands of Church-officers, distinct from the civil magistrate.

The Acts of 1567, chap. 6 and 7.

The second is the Act of 1567, chap. 7, which "enacted and declared that the examination and

admission of ministers within this realm be only in the power of the Kirk now openly and publicly professed within the same," and that, if the presentee of a patron should be "refused to be admitted by the inferior ecclesiastical authorities it should be lawful for the patron to appeal to the General Assembly of the whole realm, by whom the cause being decided shall take end as they decern and declare." Lord Glenlee understood this enactment to mean exactly what it said. There is no qualification in it allowing the Civil Court to control the Assembly in the matter, or to interfere with its judgment. He thought that it manifestly settled that an absolutely final judgment as to the admission or rejection of a presentee was vested in the General Assembly by the Legislature. Lord Moncreiff read the statute in the same simple manner, and held that, according to it, such a cause was absolutely to *take end,* as the General Assembly decern and declare—the Assembly being recognised as a supreme independent court for the whole realm with respect to ecclesiastical affairs. With reference to the idea that statesmen would at all times have been too sensible of danger in entrusting such absolutely supreme power to an ecclesiastical body, and that the Scottish Parliament could not have intended the Act of 1567 to bear this plain interpretation, a remark made by Lord Jeffrey, speaking on the Stewarton case, goes directly to the

point. He says that, at that date, there was no jealousy of the Protestant Church or of its Assembly, because the whole Protestant laity were entirely at one with the Assembly in opposition to the common enemy. In fact, the whole community was represented in the Assembly, and it held as commanding a place for ecclesiastical affairs as the Parliament did for civil matters. However slow, then, modern legislators might be to grant the supreme power contended for to the Assembly of a modern church, there is no good reason for supposing that the Parliament in 1567 did not intend what the words of their enactment signify.

Act 1569, chap. 12.

The *third* particular of legislation appealed to is the Act 1567, chap. 12, which Act, as well as the previously mentioned one, was confirmed in 1581, and again in 1592, and again in 1690. Lord Moncreiff describes this Act as the very first in which the Reformed Church derived anything from the State, and as proceeding in the narrative that "the King, with advice of Parliament, has declared and granted jurisdiction to the said Kirk, which consists and stands in preaching," &c.; "and declares that there is nae other face of Kirk, nor other face of religion than is presently, by the favour of God, established in this realm; and that there be nae other jurisdiction ecclesiastical acknowledged within

this realm other than that which is and shall be within the same Kirk, or that which flows therefrom concerning the premises." He remarked that this Act was held to be declaratory by Sir George M'Kenzie, and said that to his (Lord Moncreiff's) mind it, in very distinct terms, declared the present existence of a general jurisdiction ecclesiastical in the Kirk. He showed that before 1567, though the sanction of Parliament had been given to the Reformed religion, the government of the Reformed Church had not been settled by any Parliamentary legislation, but that the Church had been organised on an independent footing upon the principles maintained by her ministers, elders, and members. In 1542 an Act of Parliament was passed for allowing the Scriptures to be read in the vulgar tongue, and there was then a body of men voluntarily associated, who called themselves "the congregation of Jesus Christ within Scotland." Parishes for the Reformed ministers were at that period arranged by the authority of the Church alone.

In 1560 a Confession of Faith was ratified by a convention of the Scottish Estates, as a Confession professed by the Protestants within the realm of Scotland. Lord Moncreiff pointed out that this Act of 1560 plainly acknowledged a Church as already constituted holding this confession, but that it created and exacted nothing, and conferred no powers. In the same year the jurisdiction of the Pope was repudiated. But the

convention did no more. They had recognised the body of the Protestant Church as existing in the land. But they substituted no power in the place of the Pope. The whole proceedings assumed that there was already a government in the Church. "The Church," said Lord Moncreiff, "was left to stand on its own basis, and to work to its sacred objects by its own strength." In this connection he quoted the Act 1690, chap. 5, in which it is admitted, as a ground for establishing Presbyterian government, that the people of Scotland had originally "reformed from Popery by presbyters."

He went on to notice the fact that the first General Assembly was held in 1560 by no other authority than that of the Church herself. It met fourteen times during seven years afterwards, and was never regarded as illegal, but was expressly recognised as a lawful institution in the land by the Parliament of 1567. Thus, the Reformed Church of Scotland was not a creation of the State. "It had grown up," said Lord Moncreiff, "upon the foundation of the original congregation of the Protestant Reformers. It professed to be founded on the Word of God, and to acknowledge no spiritual head but the Divine Author of our religion; and it worked to its objects by the powers which it believed to be derived from that source." He next proceeded, by numerous quotations from the proceedings of the Assemblies, to prove that before 1567 they had largely exercised all the

powers of discipline and order claimed by the modern church in the pleadings of the Auchterarder and Stewarton cases.

The Parliament of 1567 did not repudiate any action of the Assembly during the seven years previous to its meeting. It did not create or erect any Church. Not a vestige of such a thing is to be found in its Acts. It simply announces that the King, with advice of the Regent and the Parliament, has declared and declares the foresaid Kirk to be the only true and holy Kirk of Jesus Christ within this realm."

Lord Moncreiff showed, further, that in all the Acts of this Parliament the leading points in the constitution of the Church are assumed as already existing, without specific parliamentary enactment; and he observed that, if any restriction were placed by the Legislature upon the powers of the Church, such restriction must be found in specific provisions, and that the opposite view of allowing nothing to the Church for which a specific statutory provision cannot be found, is incompatible with the true history and nature of the case, as well as with the understanding evinced by nearly two centuries of practical experience. He then adverted to the terms of the Act 1567, chap. 12, and the authority of Sir George M'Kenzie, for the construction which represents the Legislature as having first *declared* the existence of the ecclesiastical jurisdiction, and then granted it because the *declaration*

regarding it had been made. He further exhibited his concurrence with the view of Lords Fullerton and Jeffrey that the mere acts of preaching, &c., referred to could not themselves be spoken of as exercises of jurisdiction, but that the jurisdiction allowed by the Act of Parliament was a jurisdiction involving a full power to regulate the persons by whom, and the manner in which, these acts were to be performed. He contended that the palpable meaning of the language employed by the Legislature was, in broad and general terms, to sanction the existing jurisdiction exercised by the Church. "I can see," he said, "no escape from the conclusion that as the Church itself was adopted, its jurisdiction as previously exercised and existing was *declared* sole and exclusive in the broadest and strongest terms."

These views of Lord Moncreiff were in their substance adopted by the other judges in the minority in the Stewarton case. If well founded, they amply support the third particular mentioned in this paragraph of the Claim of Right.

Acts of 1592.

The fourth particular relates to the Act 1592, chap. 116, which has been spoken of as the charter of Presbyterian government in Scotland. The statement of our Claim is, that this Act ratified and approved the General Assemblies, Provincial Synods, Presbyteries, and kirk-sessions

appointed by the Kirk, and the whole jurisdiction and discipline of the same Kirk, and annulled all contrary laws; while it also declared that the jurisdiction of the Sovereign and his courts should not be prejudicial to the divinely appointed privilege of the Church as to all the matters with which a Church has to deal. The Claim further maintains that the State, by this Act, had recognised and established as a fundamental principle of the constitution of the kingdom, that the jurisdiction of the Church in the matters referred to was, in the very words of the Act, "a privilege that God has given to the spiritual office-bearers thereof," and was exclusive and free from coercion by any tribunals holding power or authority from the State or supreme civil magistrate.

In confirmation of the view embodied in this representation, Lord Moncreiff drew attention to the history of the contentions in the time of Andrew Melville, and to the impossibility of supposing that he and his associates would have surrendered in 1592 the main point in those contentions. That point was the spiritual independence of the Church in the sense explained in the first part of this work. Yet Melville and his associates accepted of the Act 1592 with thankfulness. Lord Moncreiff thought that the essential doctrine originally delivered by Knox, that there is no head of the Church but the Divine Head of it, and that the Church itself by its courts must be supreme in matters ecclesiastical, never could be given

up if the Presbyterian Church was to stand at all. "And yet," he said, "the theory which denies that independent jurisdiction, or would make it subject to the Court of Session, must proceed on the assumption that such a surrender actually took place." Speaking of the ideas of Mr. Whigham and the Dean of Faculty as to the concessions of the Act 1592 as if they involved no more than the few particulars specified, he asked, "Would King James and his Parliament have dared to make such a proposal to such a nation as the people of Scotland, or to the intrepid spirits who then guided them in their spiritual and ecclesiastical interests? I think it a moral impossibility." "There is no trace of such a thing."

In discussing the clauses of the Act 1592, chap. 116, Lord Moncreiff marked the circumstance that the particular points specified as agreed upon in conference refer to the special functions of Provincial Assemblies, Presbyteries, and sessions, and that they do not apply to the power of the General Assembly, but that the Act assumes its character and powers to stand precisely according to the previous use. It says nothing of the jurisdiction and power of the General Assembly, except in the broad terms, "as the same were used in times bye-past." "Is this," he asked, "the only statute which may not be explained by two centuries and a-half of practice?" "I deny," he said, "that the Act 1592 was either a *compact* or an *institution*. It was an authoritative recognition

of the existing Presbyterian Reformed Church as having existed at least previous to the year 1567, and a confirmation of the Second Book of Discipline in plain words as to the order of the Assemblies—viz., kirk-sessions, Presbyteries, Synods, and General Assemblies."

He pointed out that there were many powers which had all along been acknowledged to belong to the Church, the existence of which could not be explained on the supposition that she had no powers except what the Act of 1592 exactly specified, and the allowance of which for such a long period could be accounted for only by the circumstance that the Church and her discipline were recognised by the Parliament of 1592 as previously existing. He referred to the broad clause of the Act, "to put order to all matters and causes ecclesiastical within their bounds, *according to the discipline of the Kirk.*" He thought it was nothing less than a direct committal of all ecclesiastical affairs into the ecclesiastical jurisdiction of the Church Courts, with a distinct recognition of the Second Book of Discipline as their guide in all such matters.

Looking to the manner in which the Act recognises the General Assembly, without legislating about its powers, except by the broadest general terms, while, in its whole scope, it assumes that the Assembly was the supreme judicial court in ecclesiastical causes, and that it was the maker of laws for the government of the Church, it seemed to Lord Moncreiff that to say that the General

Assembly had no power ecclesiastical, except what was specifically laid down as to the particular matter in some statute, was just the same thing as to say that this Act 1592, called the charter of the Presbyterian Church, made no establishment of that Church at all, which could have worked for a single year. The other judges in the minority, as we have seen, took in substance the same view. Unless it has been successfully controverted, the language of the Claim of Right, which adopts it, may be thoroughly justified.

Act of Charles II., chap. 1.

The fifth particular relates to the Act of Charles the Second, 1662, chap. 1, which repeals the Act 1572, and other relative Acts. It describes those Acts as Acts "by which the sole and only power and jurisdiction within the Church doth *stand in the Church*, and in the General, Provincial, and Presbyterial Assemblies and kirk-sessions;" and as Acts "which may be interpreted to have given any Church power, jurisdiction, or government to the office-bearers of the Church, their respective meetings, other than that which acknowledgeth a dependence upon and subordination to the sovereign power of the King as supreme." The inference from these terms was thought to be manifest, that the Acts repealed had given to the Church that very extent of spiritual jurisdiction which she claimed in 1842. "I can conceive," said Lord

Moncreiff, "nothing more decisive as to the true meaning and the universally understood effect of the statutes by which the Presbyterian Church had before been established, and in particular of the only construction of the Act 1592 on this point; and I own I do not understand how any one should think it admissible to construe it otherwise in the face of this statutory declaration by the very Parliament which repealed it."

Act of William and Mary, 1690, chap. 5.

The sixth and last particular relates to the Act of William and Mary, 1690, chap. 5. The clauses are specially mentioned which establish, ratify, and confirm the Presbyterian Church government and discipline—that is to say, the government of the Church by kirk-sessions, Presbyteries, Provincial Synods, and General Assemblies, ratified and established by the Acts of 1592, and the other Acts embodied in it, and "thereafter received by the general consent of the nation to be *the only government of Christ's Church within this kingdom.*" Reference is also made to the distinct confirmation of the Act of 1592, which was given by this Act of 1690. I have already alluded to Lord Moncreiff's emphatic statement as to the terms of the Act by which it rests the authority of the General Assembly, not upon specific enactments, but upon the custom and practice of the Presbyterian government throughout the kingdom, and by which it

allows the Assembly according to that custom and practice to try and purge out all insufficient, negligent, scandalous, and erroneous ministers, by due course of ecclesiastical process and censures, and likewise *to redress all other Church disorders*.[1] The force of this particular can be perceived only when we consider the scope of the Act 1592, and the other old Acts confirmed by it, and therefore virtually embodied in it, and the strength of the argument founded on them. That argument, taken along with the expression referred to in the Scottish Claim of Right at that date, with respect to the inclinations of the people, "they having reformed from Popery by presbyters," makes it clear that the Revolution statutes recognised the Presbyterian Church as having existed, and independently framed its constitution before it was the subject of any Act of Parliament. The same truth was, according to Lord Moncreiff, set forth in substance by the words "as in the *Reformed* Kirks of this realm," &c., in the Act 1567; and by the words "the true and holie Kirk as *presently* established in this realm," in the Act 1592.[2]

The sixth paragraph of our Claim of Right refers to the manner in which all claim on the part of the Sovereign to be supreme in causes *ecclesiastical* and *spiritual* as in causes civil and temporal was, after a long-continued

[1] The Italics are Lord Moncreiff's.

[2] Reports on Auchterarder and Stewarton Cases, before referred to.

struggle, finally and expressly repudiated and cast out of the constitution of Scotland as inconsistent with the Presbyterian Church government established at the Revolution and secured by the Treaty of Union.

In illustration of this statement, reference is made first to the excommunication of Montgomery, which was attempted to be overthrown by the Privy Council, and was declared void by the Parliament of 1584, but which remained in force through subsequent concession by the King and Privy Council, and through the Act of 1592. That Act expressly cassed and annulled all and whatever acts, laws, and statutes made at any time before the day and date thereof against the liberty of the true Kirk, jurisdiction, and discipline thereof, *as the same is used and exercised within this realm.*" It had been used and exercised in the case of Montgomery. The Acts of 1584 were included in the cassing and annulling.

The fact is also emphatically noticed in our Claim that no similar interference had been since attempted till the year 1841.

A second illustration is found in the terms by which, in 1592, it was declared that an Act with reference to the royal power should not be "prejudicial nor derogate anything to the privilege that God has given to the spiritual office-bearers of the Kirk concerning heads of religion, matters of heresy, excommunication, collation, or deprivation of ministers, or any suchlike essential

censures, specially grounded, and having warrant of the Word of God." The privilege of government and discipline recognised by this language is comprehensive enough to cover whatever a Free Churchman can desire for his conscientious action in the spiritual house of God.

A third illustration appears in the repeal at the Revolution of an Act which had required every minister at his admission to swear obedience to the Sovereign as supreme governor in spiritual and ecclesiastical things.

A fourth and fifth illustration were found in the demand by the Estates of Scotland at the Revolution, and in the concession to that demand, that the Acts of Charles the Second establishing the royal supremacy in ecclesiastical matters should be abrogated. An Act of Parliament was passed in 1690 to this effect, and the principle of such supremacy was thus cast out from the legislation of Scotland as utterly at variance with the true character of our Church government.

It is worth while to observe here that the ground already shown to have been taken by counsel and judges in the last century proves that this abrogation was understood in the sense of excluding the Civil Court from all interference with the internal policy of the Church or with the constitution of the pastoral relation. Especially, the reason given in the answers for the Crown in the case of Lanark show that any such interference

was held to be *at variance with the genius of Presbytery* as embraced by the people at the Reformation and as established at the Revolution.

The seventh paragraph enumerates those enactments by which civil effect is appointed to be given to the sentences of the Church Courts, and by one of which it is declared that persons deposed by the judicatories of the Established Church cannot continue to exercise any part of their ministerial functions "*without a high contempt of the authority of the Church, and of the laws of the kingdom establishing the same.*"[1]

The enumeration of the instances in the Statute Book under this head cannot be disputed in point of fact. The application of them alone can be considered as raising any question of controversy.

The eighth paragraph brings the terms of the Treaty of Union to bear upon the assertion that the spiritual independence claimed was an unalterable part of the constitution of Scotland. It is needless for me to dwell upon this part of the subject. For if the co-ordinate jurisdiction in the Church was fixed at the Revolution to the extent of the Free Church contention, no one will deny that the terms of the Treaty of Union gave it a large and firm security. On the other hand, if

[1] See Lord Fullerton's Speech, p. 105.

the statutes at the Revolution did not involve a recognition of it, that Treaty did not confirm what had no existence before.

There is one statutory provision which, though only incidentally referred to in the Claim of Right, occupies, nevertheless, a most important place in defence of the interpretation of the law on which that Claim rests. I mean the provision of the Act 1592, c. 17, by which it was enacted that, "in case the Presbytery refuses to admit any qualified minister presented to them by the patron, it shall be lawful to the patron to retain the whole fruits of the benefice in his own hands." We have seen that this provision was regarded by lawyers in the last century *as a gentle substitute, more suited to the genius of Presbytery, for the compulsitors of law,* which were employed under Episcopacy. If this were not its intention, we may well ask on what other ground it could have been introduced. At the date of the Act 1592, the King and Parliament had good reason to know that the Church would not submit to those compulsitors. They would easily ascertain that a right to retain the fruits of the benefice would not be considered as an encroachment upon ecclesiastical jurisdiction, while it would tend to prevent irregular action by the people and the Church.

If such was not the view on which the enactment was based, how could it have any reasonable origin? If it were now proposed to have such an enactment in

England, would not the practical English mind at once say, "There is no occasion for this roundabout mode of action. The bishop cannot legally refuse to admit a qualified presentee of the legal patron. If he were to do so, the law would promptly and at once compel him to admit, long before any question about the fruits of the benefice could arise. Such a provision can exist in Scotland, only because your Scottish Parliament either made an egregious blunder, or were obliged to yield to a Scotch prejudice against the straightforward compulsitors of law." It is difficult to resist the conviction that such a statement would be correct from an ordinary Englishman's point of view, when thinking of the matter without any special prepossession.

I maintain that it is also correct in its own nature. The estimate which it embodies corresponds to the judicial conceptions of the last century, and commends itself to the common sense of all, in whose minds no prepossession has been at work as to the necessity of civil control over the Church for the good order of government. Let men only look in the face the certainty of the truths, that Melville and his associates held the Free Church doctrine of spiritual independence; that the Parliament of 1592 intended to satisfy them on that subject; and that they did welcome the Acts of that Parliament with satisfaction; and the inference becomes irresistible, that the arrangement about the fruits of the benefice was

both designed and fitted for the purpose of substituting a gentle remedy in the room of others, to which it was known that the Church could not consistently submit. Assuredly, it is not wonderful that, in relation to this subject, many people should think the legislators of 1592 and the lawyers of the eighteenth century, wiser in their generation than the majority of their successors.

The question remains, whether any adequate reply was given to the strong representations of constitutional law which I have endeavoured to set before my readers. I trust I have brought forward good reasons for rejecting the answers that have been made to the view exhibited in our Claim of decisions previous to the Auchterarder one. But it may be reasonably asked whether the alleged foundation for these decisions, or for the principle said by us to be involved in them, is really a valid and secure one.

The Dean of Faculty Hope endeavoured, by very elaborate and minute argument, to prove that the Act 1567, c. 7, could not have the signification attributed to it by Lord Glenlee, and did not imply that the judgment of the Assembly was to be fixed in any other respect, except that of determining the qualifications of a presentee in doctrine, literature, and morals. He said that such signification would have made the judgment of the Assembly shut out that of the Civil Court, even as to "the fruits of the benefice;" which confessedly it

does not do. But this reasoning overlooks the distinction recognised by the minority of the Court between what undoubtedly belongs to the civil department, and what alone is claimed by us for the ecclesiastical. The provision about the fruits of the benefice was not introduced till 1592, and it was, in our view, intended to put a check of civil authority upon the action of the Church Courts, without the exercise of coercive power. The question, whether this check was meant to apply to such a rejection as took place under the Veto Law, is a different matter. But whether it was or was not so meant, the finality of judgment given by the Act 1567 is not affected, in so far as the ecclesiastical act of induction to a pastoral charge is concerned.

The other arguments of the Dean on this point, adopted as they were by the majority of the Court, all proceed on the assumption that there is inherent in the supreme Civil Court a right of controlling other supreme courts when, in the judgment of that Court, they travel beyond their statutory jurisdiction and functions. Neither the Lord President nor any other judge in the majority ever adduced any proof from the statutory constitution of the Court of Session, that any such overriding powers had been assigned to it, nor answered the strong statements of the minority to the contrary. They simply assumed that the case must be so in every civilised country. Because the court of the Presbytery had not

been distinctly recognised in any previous statute, they assumed that the Presbyterian Church had no proper existence before 1592, and that it was then a creation of the State. They rejected the idea of its having been recognised as already a national Church, by a constitution and organisation formed through the conscientious convictions and exertions of its members. They disregarded the historical deduction which, comparing the Acts of Parliament with events, made it manifest that both the settlement in 1592 and that in 1690 involved a recognition of the independent position gained by the Church, through God's blessing on her own efforts. They assumed the two postulates, that there must be in the kingdom one overriding court, and that the Church was a statutory creation in 1592; and in the strength of these assumptions, they beat back all the arguments drawn from the special history of Scottish legislation, and the long prevalent ideas of Scottish statesmen and lawyers.

Lord Medwyn, indeed, admitted that there were several matters in which the Church must be regarded as possessing the very independence claimed, and in which, if she acted contrary to the intentions of the Legislature, the only remedy must be found, not in the Court of Session, but in Parliament. Lord Medwyn's view of the distinction between one ecclesiastical matter and another, though deserving respectful attention, would probably not commend itself to the Presbyterian mind. But as it

is difficult to reconcile his admission respecting the points he mentions with his opposition to our claims; and as no other judge agreed with him, it is unnecessary to examine his opinion more particularly.

I abstain from discussing further the opinions of the Scottish Bench. For the thing of most consequence in relation to the argument of the minority is to see what was the substance of the reply made to them by the Lord Chancellor Cottenham, in deciding the Auchterarder case on appeal.

Because in 1565, the General Assembly had specially represented to Queen Mary that, without depriving Her Majesty of the right of presentation, they wished presentees to be tried and examined by learned men of the Church, and because a particular writer, in 1566, says that lay patrons should present persons qualified and habile, of sufficient literature, honest in life, and of good manners, his lordship, without adverting to the wholly different state of things in Scotland when the Parliament of 1567 met,[1] took for granted not only that the word *qualified* used in its Act, chap. 9, must mean exactly the same thing as what was indicated by what he quoted, and no more; but that the power of final judgment given to the Assembly by it must be confined to the question of qualification in that restricted sense. This was mere assumption without

[1] The difference was that Queen Mary had been overthrown, and those favourable to the Church in power.

regard to the relation in which the legislation of 1657, under the Regent Murray, stood to the whole action and requirements of the Church during the previous seven years. Then, though he quoted the provision made in 1592 as to "the fruits of the benefice," he said nothing on the question why it was introduced, nor on the restriction which it had been supposed to put upon the binding clause of the previous Act of the same Parliament.

In common with some judges in the Court below, he misunderstood what had been pled regarding the legislative power of the Assembly, as if the objection had been raised for the Church, that the contest ought to be regarded as one with the Assembly. For a main point in the pleadings for her had been, that the action complained of was quite competent to the Presbytery, even if no Act of Assembly had ever been passed on the subject. He showed an ignorance, natural to one in his position, of essential particulars relative to ordination and induction in the Church of Scotland. Without grappling at all with the large and broad foundation on which the claim to our absolutely independent and co-ordinate jurisdiction was based, as matter of legal and historical evidence, and, without remembering that the provision about "the fruits of the benefice" would be sufficient to check extravagance, he enlarged on the common idea of English statesmen and lawyers, that the setting forth of such absolutely independent and co-ordinate jurisdiction

is but a mode of describing pure despotism, and re-echoed the conception of Lord Meadowbank, that if Parliament alone can remedy the excesses of the General Assembly, it can only do so by an Act which the Civil Court must enforce, and which the Assembly might again resist.

Lords Fullerton and Jeffrey had answered this view by anticipation. Upon the principle involved in it, we may ask, in accordance with the eighty-eighth proposition of Gillespie, "Who is to correct the excesses of the Court of Session or the House of Lords? What kind of legislation can reach the supreme Civil Court?" The answer to such questions must be briefly given in a subsequent chapter.

The Lord Chancellor considered that the astrictive clause regarding Patronage in the Act 1592 was enough to prevent the previous clauses in the Act, empowering the Presbyteries to put order to all matters and causes ecclesiastical, being interpreted according to their plain meaning, as amounting to a direct committal of all ecclesiastical affairs to the exclusive jurisdiction of the Church Courts. He assumed that unless some statute had, in relation to the Church Courts, deprived the Court of Session of the ordinary power for giving redress, it was not at all necessary to have positive evidence in any statute extending that power to ecclesiastical matters. But this, in the face of the clear statements made by Lords Fullerton, Jeffrey, and Moncreiff, and afterwards so lucidly illustrated by Lord Ivory,

was, with reference to Scottish law, an unreasonable assumption. Finally, he took for granted some defective descriptions in the Court below of former decisions; while manifesting the same unwillingness which appeared there, to recognise the distinction between what was civil and what was ecclesiastical, on which the minority had fixed attention. In particular, he assumed the correctness of an entirely erroneous representation regarding the case of Unst, which it is difficult to suppose he would have adopted, if all the right sources of information had been within his reach. In that case and in others, inaccurate references both at the Bar and on the Bench of the Scottish Court were fitted to mislead him, especially if he were not very familiar with the phraseology of our processes.

He laid peculiar stress on the second Kiltarlity case, which was decided on the 23rd of June, 1823; supposing it to be an instance in which the Court exercised jurisdiction over a Presbytery, by requiring them to settle a presentee. But his lordship failed to notice the full account of the case as clearly stated by Solicitor-General Rutherford, or the terms of the decision as referred to by the Dean of Faculty. If he had, he would have seen that no order against the Presbytery was or could be issued in the action. It was an action at the instance of the Presbytery of Inverness for having it proved that the presentation of the Roman Catholic patron was not valid, and that the patronage had fallen to them *jure*

devolute. It related to a question of civil right, raised by the Presbytery themselves; and the summary of the judgment, as quoted by the Dean of Faculty Hope, was in these words: "A Presbytery who had agreed to receive a presentation by a patron who was a Papist, held barred from afterwards objecting to it on that ground." The plea of the patron and presentee was given effect to, simply by the rejection of the Presbytery's application. That plea was thus expressed: "That the Presbytery, having received the presentation, were now barred from objecting to it, and refusing to settle the presentee." The result of the decision was to deny the right of the Presbytery to the *jus devolutum,* and to prevent them from legally exercising it, or refusing to settle the presentee on the ground of the patron's defective title. The Court decided no question having any application to the plea of co-ordinate jurisdiction raised in the Auchterarder case.

Lord Cottenham was a just, upright, and discriminating judge. But those conversant with the principles and constitution of the old Church of Scotland cannot but feel, in reading his judgment, that he was not sufficiently emancipated from the power of English pre-possessions to estimate the force of the arguments which he resisted. It could hardly be expected that, when these prepossessions were strengthened by opinions from a majority of the Scottish Bench, he would depart from them.

CHAPTER IV.

THE ENCROACHMENTS OF THE COURT OF SESSION.

1. Purposes of its Institution and Limits of its Power.

In the sixteenth paragraph, the Acts of Parliament instituting the Court of Session and defining its powers are quoted. It appears from Act 1532, chap. 1, that its judges were originally appointed to "sit and decide upon all *actions civil;*" and from Act 1537, chap. 36, that the purpose of its institution is defined to be that of "doing and administration of justice in all *civil actions.*" Of course, the House of Lords, as a Court of Appeal from the Court of Session, must be limited to the decision of cases which competently belong to its jurisdiction. If that jurisdiction be strictly limited to "actions civil," then in dealing with appeals from its judgments the House of Lords can deal only with "*actions civil.*"

The point was pressed by the judges in the minority that the terms of institution precluded the idea of the Court of Session having any pre-eminent authority to correct the excesses of other supreme courts, or of the supreme Ecclesiastical Court in particular. They asked

for evidence of such pre-eminent authority, and denied that there was the slightest vestige in Scottish legislation of its having been conferred. What were the only answers given to their representations? The only Act of Parliament brought forward in support of the views of the majority was the recent Act 1707, chap. 9, quoted by Lord Mackenzie. It simply appoints the Lords of Council and Session "to judge, cognosce, and determine in all affairs and causes whatsoever which, *by the laws and Acts of Parliament of this kingdom,* were *formerly* referred to, and did pertain and belong to the jurisdiction and cognisance of the Commissioners formerly appointed for that effect, as fully and freely in all respects as the said Lords do, or may do, in other *civil causes.*" The particular specification was dwelt upon in the Stewarton case, that the power was given "to disjoin two large parishes, to erect and build new churches, as they shall think fit." But the subject of this specification evidently involves a *civil* department, which may be dealt with quite independently of ecclesiastical arrangements—a department with which the Church claimed no right to interfere; and this Act of 1707 expressly limits the powers assigned by it to the decision of *civil causes,* and to what had formerly belonged to Commissioners formerly appointed. It did not, therefore, go beyond the general limitation to *actions civil* involved in the original institution of the Court.

The argument of the majority really lay in two assumptions—the one that the Church had no jurisdiction, even in ecclesiastical matters, except what had been exactly defined as belonging to her by specific enactments; and the other that, in every civilised country the supreme Civil Court must have jurisdiction to interpret all statutes, with decisive authority, and, in particular, to restrain other courts within their statutory limits. The unanswerable reply was, that there was not a vestige of evidence in Scottish legislation to bear out the latter assumption; that there was ample evidence to disprove the former; that they were both at variance with the whole character and history of Scottish ecclesiastical arrangements; and that they were not required for the orderly adjustment of matters in a well-constituted kingdom. It is clear that they cannot be reconciled with Free Church principle, and that the authoritative maintenance of them was sufficient to necessitate the Disruption. The charge of encroachment brought against the Court of Session is grounded upon the representation of the limitation assigned to its jurisdiction and the thoroughly co-ordinate jurisdiction assigned to the Church Courts, according to the interpretation of constitutional law, which the minority of the judges illustrated and enforced so largely and lucidly. If their views were correct, then the British Parliament of 1843 allowed the old constitutional connection of Church

and State in Scotland to be utterly broken up and destroyed.

2. Relation of the Encroachments to the First Judgment of the House of Lords in the Auchterarder Case.

This was the only judgment of the supreme Court of Appeal, which had been pronounced at the date of the Claim of Right. Although it did not actually assert a jurisdiction to coerce the Church Courts in the fulfilment of their functions, it was regarded by Lord Fullerton and those judges who agreed with him, as involving a principle which would lead to such coercion. But some of the judges in the majority appeared in 1838 to doubt, whether coercive measures could be founded upon it, and it admitted of a possible construction consistent with its direct effect being confined to the possession of stipend and other civil advantages. On this account it was thought advisable for the Church not to be hasty in concluding that the supreme Court of Appeal would go so far as to deprive her of her ancient, scriptural, and constitutional jurisdiction. Accordingly, she resolved to take the question of the liability of the Presbytery of Auchterarder in an action for damages, to the House of Lords, that an opportunity might be given to their lordships of more maturely considering her constitutional claims, before bringing the conflict to an irreversible issue. Her appeal on that question of damages was not heard till after the

meeting of Assembly in 1842, and thus there could be no reference to it in the Claim of Right. The judgment in the former case is not founded on in that document as an encroachment, because the Church was proceeding on the theory, that possibly it might not be ultimately found to involve a support to the Court of Session in their subsequent decisions.

3. The Particulars of Encroachment.

It is quite needless, and would be useless for me to discuss minutely in succession the thirteen items of the indictment against the Civil Court, which are embraced in this paragraph. For the force of every one of them depends on the admission of the points of scriptural principle and constitutional law which I have already exhibited and discussed. If the Church Courts had not, both by Christ's authority, and by statute, common law, and treaty, the absolutely independent and co-ordinate jurisdiction which they claimed for themselves, and which the minority of the judges would have allowed to them, then I do not see on what footing any one of the instances quoted could be regarded as an encroachment. On the contrary, on that supposition the Court decided correctly in them all, and only carried out consistently the principles of judgment which the law warranted, and which no higher principle precluded. But if the minority were in the right; if the supreme Court of

the Church had the high place assigned to it by their powerful reasonings; and if the Court of Session had only the limited jurisdiction which those reasonings asserted so decidedly; then every one of the decisions enumerated in our Claim was an invasion of the ecclesiastical jurisdiction—an encroachment upon the spiritual privileges of the Church Courts—a violation of the constitution of the country—an act in defiance of the statutes referred to—and a contempt of the laws of the kingdom. This heavy imputation does not impeach the sincerity or honesty of the judges. It simply characterises the effect of their conclusions according to the real meaning of the opposite opinions. If, on the other hand, the constitutional pleas of the Church were ill-founded, while her claims were scripturally good, then the encroachment was not by the Civil Court, but by the legislation of the country.

I will advert specially to two instances, in which want of accurate attention to the statements made has occasioned misapprehension. The first item of the charge relates to the cases of Lethendy and Stewarton. It has not been observed by some persons referring to this item that the figures of reference do not imply that the case of Lethendy was one with which no benefice or right of patronage, or stipend, or manse, or glebe, or place of worship, or patrimonial right, was connected. That part of the allegation refers only to Stewarton. The previous part of it, representing that the admission of

Mr. Kessen was about to be done, *irrespective* of the civil benefice, is the only thing intended to apply to the case of Lethendy. Of course, there were questions of civil emolument connected with that case; but the act of admitting him to the pastoral charge was avowedly proposed to be done, *irrespective* of those emoluments. Let the principle of legal interpretation illustrated in the previous chapter be recognised, and then the proceedings of the Presbytery of Dunkeld, founded on the instructions of the Commission of Assembly, are sufficient to convince reasonable men, and would have convinced the judges,[1] that the act of induction was about to be performed, *irrespective* of the civil benefice. For the ground of the Presbytery's action was the fact, according to a quotation made by Lord Justice-Clerk Boyle himself, that the Commission of Assembly "had determined" the act of induction "*to be a purely spiritual act,* in regard to which the *Civil Courts can possess no authority.*"

The Lord Justice-Clerk must surely have known that his predecessors in the last century regarded an *induction to a pastoral charge* as a *spiritual* thing, which the Civil Court could not annul. Lord President Hope acknowledged the fact. Yet the Lord Justice-Clerk stated farther on that the circumstance of the Presbytery being required not only to *ordain* but to *induct,* was,

[1] See Appendix V. as to Lords Cockburn and Fullerton.

in his mind, enough to show that they were not proceeding *irrespectively* of the *temporalities.* The strong assertion, however, of the Commission, that what they were requiring was simply a *spiritual act, in regard to which the Civil Courts could possess no authority,* was, when read in the light of the last century, enough to make it manifest that the act appointed by them to be performed was, in their intention, altogether *irrespective* of the *benefice,* over which it was quite well known that they thoroughly acknowledged the authority of the Civil Court. The interdict was, therefore, an invasion of the constitutional rights of the Church, as these were maintained by all the judges in the minority previously to the decision of the House of Lords. For it interfered with induction to the spiritual office of pastor over a congregation of Christ's people, and with an obligation laid upon him to do his part for the spiritual interests of the parish where that congregation was situated. The statement of the Claim regarding the Lethendy case is thoroughly correct when viewed from the stand-point of legal interpretation, on which the whole document is based.

In the case of Stewarton, there was no benefice, nor right of patronage, nor stipend, nor manse, nor glebe, nor place of worship, nor patrimonial right of any kind connected with the act interdicted. Any alleged civil interest was only possible and contingent. The interdict

was against Church extension, with accompaniments and in a manner which the Church felt to be scripturally required, and which accorded, in the judgment of the judicial minority, with uninterrupted practice from the Reformation, and with constitutional law; while it belonged exclusively to her jurisdiction through that practice and that law. The Act objected to was an Act for meeting the wants of an increasing population in the way which she thought needful for carrying out her Master's commands. It is nothing to the purpose to say that she might do it in another way sanctioned by the Civil Court, if that Court had constitutionally no jurisdiction in the matter.

In all the remaining instances referred to, the truth and justice of the allegations depend on the view that is taken of scriptural principle on the one hand and of constitutional right on the other. If all the ecclesiastical acts enumerated as either prohibited or enjoined, or attempted to be nullified, by the Court of Session, belonged to a class, which, on account of the sacredness attached to them by the Church, had been by statute excluded from any cognisance by the Court of Session, and committed to the exclusive jurisdiction of the Church Courts, so that even the interpretation of the statutes regarding them, for the regulation of ecclesiastical action, lay only with the General Assembly, then all the prohibitions, injunctions, and attempts at nullity, were unscriptural and unconstitutional encroach-

ments upon spiritual jurisdiction. Then the Court of Session trampled upon ordination vows, interfered with conscientious obedience to the Head of the Church, and did their best to overthrow time-honoured privileges which had been guaranteed by the most solemn securities.

The seventeenth paragraph of the Claim refers to threatened encroachments of the same kind, which had not yet reached their consummation in 1842.[1]

[1] Appendix VIII.

CHAPTER V.

EFFECT OF THE ENCROACHMENTS UPON THE POSITION OF THE CHURCH.

1. What could the Church Courts conscientiously do in Submission to the Encroachments?

They could endeavour, both by action and speech, to manifest, in every available way, that they acknowledged the supremacy of the Civil Court over the disposal of all the temporalities attached by law to the exercise of their spiritual functions. They could facilitate any inquiry into their ecclesiastical, or even their most purely spiritual procedure, with a view to determining the disposal of those temporalities. They could recognise the competency and submit cheerfully to the consequences of any decision finding their course of action illegal, *to the effect of taking temporalities away.*

They were willing to do this, retaining their position in an Establishment, until means of amicable adjustment could be found. Their conscientious readiness to act thus is intimated at the commencement of the twentieth paragraph of the Claim, as well as in the fourteenth and

at the commencement of the sixteenth. They exhibited as strong a spirit of conciliation as was consistent with a firm adherence to vital principle.

2. What were the Church Courts prevented by Conscience from doing in Submission to the Encroachments?

This question is dealt with in the eighteenth and twenty-first paragraphs. They could not carry on the government and discipline of Christ's Church, according to their conscientious view of His laws and its constitution, subject to the exercise, by any secular tribunal, of such powers as had been assumed by the Court of Session. If those foundations of principle be admitted which I endeavoured to illustrate in the first part of this work, or even if it be clearly seen that the Church stood upon them through strong conviction in 1842, the inference is inevitable that she could not conscientiously regulate her ecclesiastical movements according to those orders of that Court which she complained of. Therefore, the General Assembly of 1842 solemnly declared that they could not, in accordance with the Word of God, the authorised and ratified standards of the Church, and the dictates of their consciences, intrude ministers on reclaiming congregations, or carry on the government of Christ's Church subject to the coercion attempted by the Court of Session, as above set forth.

3. What must the Church do in the Face of such Encroachments?

The nineteenth paragraph answers this question. The Church must, at the risk and hazard of losing her connection with the State, and the public benefits attached to that connection, persevere in maintaining her liberties as a Church of Christ, and in carrying on the government thereof on her own constitutional principles, and must refuse to intrude ministers on her congregations, or to obey the unlawful coercion attempted to be enforced against her in the exercise of her spiritual functions and jurisdiction, or to consent that her people be deprived of their rightful liberties. She declared that she must rather encounter the loss of secular benefits than attempt to carry on the government of the Church subject to the coercion attempted by the Court of Session, and that she could not put those benefits in competition with the inalienable liberties of a Church of Christ.

These intimations were fitted to warn persons having political power or influence that a disruption was at hand, unless an adequate concession were made to the Church. The majority of such persons would not believe in the sincerity and fixedness of purpose with which the Church announced her convictions and determination. By a worldly-wise but erroneous judgment, they allowed a result to ensue which they afterwards regretted in vain.

CHAPTER VI.

THE PARTIES IN WHOSE NAME AND BEHALF THE CLAIM OF RIGHT WAS MADE, AND WHAT IT AMOUNTED TO.

1. For whom was the Claim made?

The language of the twentieth paragraph leaves us in no doubt concerning the true reply to this question. That reply is of great importance for regulating the conduct and determining the consistency of staunch Free Churchmen at the present stage of our history. The words of the twentieth paragraph bearing on the question are: "THEREFORE, The General Assembly, while, &c., DO, in name and on behalf of this Church, and of *the nation and people of Scotland,* and under the sanction of the several statutes and the Treaty of Union, hereinbefore recited, Claim as of Right," &c.

The Claim was thus made, not for a Church simply, which might include a certain portion of the people, but for a thoroughly *National Church,* representing and carrying along with it the great body of the people. By his magnificent Church Extension movement, Dr. Chalmers had been rapidly advancing towards a point at which the

Establishment would have unmistakeably exhibited such a character. It would have been thoroughly national—thoroughly occupying the place of the old Church of Scotland—both by its principles and by its pervading influence in every quarter of the land. But an arrest upon the progress towards this consummation was threatened by the encroachments of the Court of Session. The framers of the Claim of Right, therefore, felt themselves called upon to issue its declarations and protest, in order that what seemed so grievous an evil and so discouraging a disappointment might not be realised without adequate remonstrance with those who could prevent it. Our ministers and elders looked upon the impending prospect as indicating a far greater injury to the nation than to any party in the Church.

2. To what did the Claim amount?

It amounted to a demand that the Church should enjoy what she had been contending for, according to law as interpreted in the previous parts of the document; that she should specially be enabled to protect the spiritual liberties of her people; that she should be herself protected from such encroachments as the Court of Session had made; and that her people should be secured in their Christian and constitutional rights and liberties. It was, in fact, a claim for the recognition by the Government and the Legislature of the thoroughly

co-ordinate jurisdiction held to be an essential part of the precious legacy which our forefathers had bequeathed to us, while under that general head was included the power of preserving congregations from the intrusion of unacceptable ministers. It built what it asked for as matter of *Right* upon what its authors considered to be demonstrably the old constitutional principle of Scottish ecclesiastical arrangements.

The truth and justice of its demand depend, of course, on the force of the arguments which I have already exhibited. But let it be noted that, if these arguments be fallacious, the erroneousness of the Claim of Right lies not in careless or extravagant assertions by its authors, but in the fallacy of laboriously prepared and powerfully stated opinions by some of the profoundest and ablest lawyers who ever sat upon the Scottish Bench. We ought further to observe that, while the Assembly of 1842, in setting forth their demand, represented the privilege of spiritual independence to be so vitally important as to make it worth while to surrender the temporal advantages of an Establishment for the sake of maintaining it, that Assembly did, at the same time, express a high sense of the benefit derived from those advantages, and did claim for themselves and the nation the preservation of that benefit in a state of freedom from the encroachments against which they protested. There is no manner of doubt that our Claim meant

a scriptural and constitutional *Right* to have protection for spiritual independence *in connection with an Establishment.* It, at the same time, manifested a resolute purpose to have spiritual independence without Establishment, rather than Establishment without spiritual independence.[1]

[1] Appendix IX.

CHAPTER VII.

EXHORTATIONS FOUNDED ON THE CLAIM OF RIGHT AND EMBODIED IN IT.

1. The Exhortation to a Testimony.

At the beginning of the twenty-third or last paragraph, not only the Christian people of this kingdom, but all the Churches of the Reformation throughout the world, who hold the great doctrine of the sole Headship of the Lord Jesus over His Church, were called to witness that it was for her adherence to that doctrine and its legitimate consequences that the Church of Scotland was subjected to hardship, and that her rights were put in peril. No one can deny that this was a most warrantable call, on the supposition that the previous declarations were well founded. It was very largely responded to. It proceeded upon the conviction that the questions in controversy were questions not merely of legal interpretation, but of scriptural obligation.

In judging of the ground still maintained by thoroughly consistent Free Churchmen, impartial inquirers will not lose sight of the strength belonging to the sense of such

an obligation. Nor will they overlook the argument derived from the historical fact, that the force of the same obligation was felt at every stage in the progress of the Reformed Church of Scotland. They may thus be led to see that the provision as to "the fruits of the benefice" was introduced into Scottish legislation, and that it was acted on by the Scottish Bench during the last century, not for some irrelevant reason which it is difficult to account for, but out of respect to the conscientious feeling of the Church on the subject of scriptural obligations.

2. The Exhortation to Endurance and Self-sacrifice.

In the same paragraph, the office-bearers and members of the Church of Scotland, who were willing to suffer for their allegiance to Christ, were specially invited to stand by the Church and by each other in defence of the doctrine already indicated, and of the liberties and privileges which rested upon it. This invitation signified, of necessity, that, whether in or out of an Establishment, and whether left unmolested or exposed to coercive movements from a Civil Court, those who held that doctrine were bound in conscience to act upon it steadfastly in all circumstances, and never to compromise it in the least degree. It is well known to what a large and unexpected extent this invitation was complied with.

It evidently carried with it a persuasion that it was the duty of all true-hearted members of the Church of

Scotland to look upon the civil advantages of an Establishment, however valuable in themselves, as a very light matter in comparison with the practical assertion, at all hazards, of the liberty claimed for the Church to follow her own conscientious judgment in regulating the affairs of Christ's house. That persuasion led great numbers of persons into the practice of much self-denial and liberality for the cause of spiritual independence. They believed that they were thus honouring Christ as Head and King of His Church, maintaining the spiritual liberty of His people, and advancing His spiritual kingdom in the country and in the world.

3. The Exhortation to Prayer.

The office-bearers and members were asked to unite in prayer for three leading objects—*first,* That God would turn the hearts of the British rulers to keep unbroken the faith pledged to the Church, and the obligations come under by former Governments to God Himself; *secondly,* For strength to the Church, its office-bearers, and people, to endure loss, and also for zeal and energy to perform their part; and *thirdly,* For the restoration, in God's good time, of the benefits of an Establishment, and for grace to employ these more effectually towards their proper objects. If it be a duty to pray for an object, it is a duty to promote that object by every suitable and available means. Therefore, according to

the principles and statements of the Claim of Right, it was the duty of the Church, if separated from establishment, to exert herself in every reasonable manner for the restoration of its benefits, *according to the description of them and the rightful claim for them previously set forth.*

I have now, I think, exhausted, in my examination, all the essential materials for estimating the bearing and value of the Free Church Claim of Right. It only remains that I should add a chapter with respect to its results, another with respect to its reasonableness, and a third with respect to the obligations which it imposes on the Free Church of Scotland.

CHAPTER VIII.

RESULTS OF THE CLAIM OF RIGHT.

1. Its Practical Results at and after the Disruption.

It was brought before the House of Commons in March, 1843, and, in opposition to the votes of a large majority of the members for Scotland, the motion for inquiry into it was rejected. That vote, along with a similar action in the House of Lords, and corresponding procedure by the Crown, was accepted of by those guiding the counsels of the Church as a confirmation by the Legislature of the judgments pronounced by the Civil Courts. Thereafter, persons elected as members of Assembly, who were ministers or elders of congregations formed by the Act of Assembly constituting *quoad sacra* parishes by its own authority, and persons elected by Presbyteries composed in part of such ministers or elders, were served with interdicts from the Court of Session against taking their seats. Most of these persons considered, after the vote in the House of Commons, that they could no longer disobey the interdict. It was thus seen that the ensuing General Assembly could not be duly constituted as an Assembly of an Established Church, according to the

views of scriptural and constitutional principle maintained in the Claim of Right. Therefore, the Moderator of the last Assembly, Dr. Welsh, declined to proceed with a view to constituting it, and read and laid on the table the well-known Protest, after which he and those who supported him left the place of meeting, and adjourned to hold a Free Assembly, and to reconstitute the Church upon what they regarded as a scriptural and constitutional basis.

The Protest re-echoed in a form befitting its special occasion the conclusions and arguments of the Claim. It referred, of course, more particularly to the decision in the Stewarton case, as well as to others which had not been pronounced at the date when the Claim was adopted. But it gave prominence to the reasons why a lawful Assembly of the Church could not now be held in connection with the State. The parties signing that Protest did not leave the Church of their fathers. They did not secede from it. They only left the place of meeting, protesting that a lawful Assembly could not be held there. They insisted that no Assembly constituted there, in submission to the conditions now declared to be law, should be deemed a lawful and free Assembly of the Church of Scotland, according to its original and fundamental principles. They also protested that the Claim of Right should be held as setting forth the true constitution of the Church. They did not resign their spiritual charges and functions. They only demitted their civil emolu-

ments and privileges. They disconnected themselves from the State. They did not disconnect themselves from the Church. Believing that, along with the persons who had been unconstitutionally interdicted from taking their seats in the Assembly, they were a decisive majority of its constitutionally elected members, they looked upon themselves, in conjunction with other ministers and elders adhering to them, as having a legitimate claim to regard their meeting in Canonmills Hall as a meeting of the only true and constitutional General Assembly which met that year.

I believe it to have been not only true that, if the election of the interdicted members were held valid, the party constituting the Free Church had in 1843 a large majority of the Assembly in their favour ; but also that if the whole number of ruling elders throughout the Church could have been counted, a majority of the whole ministers and elders taken together adhered to the Free Church. But I do not wish to discuss the subject of the claim to be the true Church of Scotland upon a question of mere statistics. I think it ought to be judged of, in the first place, by the question, whether or not the Assembly constituted in 1843 upon the footing of the views enforced by the Civil Courts and the Legislature, was a scriptural and constitutional Assembly, according to the original principle upon which the Church had been instituted and established. I think it ought to be judged of, secondly, by the question, whether or not the first Assembly of the

Free Church did or did not truly correspond to the original scriptural and constitutional idea of the Presbyterian Church of Scotland and its Assembly. The result has certainly been, that the Free Church of Scotland has successfully sustained her ground in assuming the character and position of a Church representing that idea. We are persuaded that our Church is the same Church which adopted the Claim of Right in 1842, and that those now connected with the Establishment belong to a body which separated from that Church in 1843, for the sake of the advantages which an Establishment confers.

I do not say that they did so unconscientiously; for I believe that many of them thought they were thereby doing their duty. Much less do I accuse their successors of occupying their places for worldly reasons. On the contrary, I esteem some of them very highly as well-principled and earnest workers for the cause of Christ. Still, I think that they are in error to the extent which the previous statements imply.[1]

I need not dwell further upon the beneficial consequences which, under an overruling Providence, and by the influences of Divine grace, have been brought out of an event which seemed to our defective vision so disheartening and alarming. Much distress and perplexity undoubtedly were occasioned to individuals who patiently endured very severe suffering. But the interests of

[1] Appendix XI.

Christ's kingdom have been extensively promoted both at home and abroad.[1]

2. Legal Results of the Claim of Right.

The Free Church has certainly not obtained complete emancipation from assaults by the Civil Court upon her principle of spiritual independence. I have already shown that she did not expect such emancipation. But the exclusive jurisdiction of her courts has never yet been really interfered with.[2]

It seems to me that very incorrect conceptions have been formed as to the meaning of her pleas in the Cardross case, arising out of misconceptions as to the true nature of her ground either before or after the Disruption. We did not contend for more in that case, as respects our freedom from interference, than what the Court in the end *practically* allowed to us. I am quite prepared to admit that the principle of judgment in the case of a disestablished Church is a more difficult matter

[1] I say these things all the more decidedly, because I know I am personally liable to the inquiry, "Why did you not join in the Disruption on that 18th of May? Why did you delay joining the Free Church for several weeks?" My answer is, My delay was partly due to family reasons, which took me suddenly to a distance from the scene. But I acknowledge that it was chiefly owing to my carrying the principle of *co-ordinate jurisdiction* to what others thought an unreasonable extent. I was unwilling to consider the conflict entirely at an end till the General Assembly had palpably abandoned it. Their doing so settled the law finally for me. But in all other respects I was at one with those who made the original exodus.

[2] Appendix II.

for the judges, than it *ought to have been* in the case of the Established Church. I see clearly that even those who gave a decided opinion in favour of our claims before the Disruption, might feel themselves obliged to guard against yielding too much to us as members of a voluntary Church. They did not actually oppress us in the Cardross case, although the ideas expressed by the judges regarding it would not make us feel absolutely secure, if we looked much to what the Civil Court might hereafter think of doing.

We admit fully that our right to property must depend entirely on the judgment of the Civil Court, and may be made legitimately to turn on a question of contract. But, as regards the free exercise of our spiritual functions, our strongest outward safeguard for protection is, we think, the probability that public opinion in this country will not tolerate a direct interference with the internal discipline of a dissenting body, and that the maxims laid down by Lords Cranworth, Colonsay, and Curriehill will be generally acted on.[1]

At the same time, I am not prepared, as a Free Churchman, to *ask* the Legislature for any enactment in the direction of disestablishment in Scotland, which shall not embody a protection for the old Presbyterian principle of spiritual independence. I think that we cannot consistently approve of legislation which does not do so.

[1] See Part I. chap. II. sect. 3, p. 54, and chap. III. sect. 3, pp. 68, 69.

CHAPTER IX.

THE REASONABLENESS OF THE CLAIM OF RIGHT.

THE only plausible ground on which its reasonableness can be assailed is the difficulty of adjustment when the Civil Courts and the Church Courts come into collision. But, however great this difficulty may be, the prior question arises, whether it be not a difficulty which both Church and State are bound to face. If the Church Courts are under obligation to Christ to exercise their functions in simple following of what they think His word requires, without regard to the commands of any civil authority, is it not evident that some way ought to be found for protecting the conscience of the Church, and yet putting an adequate check upon any extravagance to which she may be tempted?

It is denied that there is any *via media* between Popish supremacy and the supremacy of courts of civil law. But our historical and constitutional doctrine is, that our ancestors found a *via media*, and carried it out with a large measure of success. They found a *gentler* method, more suited to the genius of Presbytery, for restraining the excesses of presbyterial assumption; and

they found, also, a method for leading patrons not to act in dangerous resistance to the conscientious desires of the people. We find, on the one hand, that, during the last century, the Crown and the patrons often waived their rights for the purpose of keeping harmony with the people. We find, on the other hand, that persons inducted by the Presbytery were induced to withdraw when the patron had been found entitled to "the fruits of the benefice," and that others were deterred from accepting of calls, when the patron's right had been pressed or established.

The question, however, may naturally be suggested, as to what is to ensue, when not only the Civil Court has come to conclusions against the conscientious convictions of the Church, but the Legislature is not prepared to satisfy those convictions. Manifestly, if there be an irreconcileable difference about a practical subject, there is no resource, except disestablishment by the State on the one hand, or what may be in substance a withdrawal of the Church from State connection on the other. But the principle of spiritual independence does not in the least increase the difficulty. On the contrary, it tends to facilitate adjustment, by allowing the two parties—the State and the Church—to consult about the difference upon an equal footing. I repeat what I have said already, that where there is a genuine will, it is probable that a practicable way will be found.[1]

[1] Appendix IX.

CHAPTER X.

THE OBLIGATIONS WHICH THE CLAIM OF RIGHT LAYS UPON CONSISTENT FREE CHURCHMEN.

1. THE MAINTENANCE AND EXERCISE AT ALL HAZARDS OF A JURISDICTION IN ECCLESIASTICAL MATTERS WHICH SUBMITS TO NO CONTROL BY ANY POWER EXCEPT THAT OF CHRIST'S WORD AND ORDINANCES.

I SUPPOSE that an obligation to this effect will be admitted to follow from the doctrine of the Claim. The Free Church has never yet been turned aside from the fulfilment of this obligation by any civil coercion, or by any threat of its coming upon her. I believe that she is prepared to fulfil it at all hazards, and to suffer for it if necessary.

2. REASONABLE ENDEAVOURS ON FITTING OCCASIONS TO PERSUADE THE SCOTTISH NATION AND THE BRITISH LEGISLATURE THAT THE *Principles* OF THE CLAIM OF RIGHT OUGHT TO BE CONCEDED IN ECCLESIASTICAL ARRANGEMENTS FOR SCOTLAND.

I say the *principles* of it, because there may be circumstances in which it would not be in the power of the Legislature to grant all that might follow from the

admission of those principles. No political agreement, for example, could compel the people of Scotland to desire the re-establishment of a Church upon the basis of the Claim of Right. But without the cordial consent of the people generally, there cannot be a truly National Establishment in accordance with the views of Dr. Chalmers.

There is a particular consequence of our Claim that we ought to contend for in one way or another under all circumstances. I mean the termination of the existing connection between Church and State in Scotland. I join in no imputations against the Established Church as a Church. I give its ministers and elders credit for acting conscientiously from their own point of view. From that point of view they are called upon to do their best for the advancement of their Church. But from my point of view, and from that of the Claim of Right, I know *of no consequence which follows more logically out of the strong declarations* in that document, than that the *existing* connection should terminate. If it be based, as those declarations represent it, upon the overthrow of our national constitution, upon the violation of legislative pledges, and upon opposition to scriptural principles, how, otherwise, can the supporters of those declarations think of it than as a thing to be condemned and put an end to? If the system of the existing Establishment be Erastian, how can we, regarding Erastianism as contrary to the Divine Word, avoid desiring that the Erastian system be overthrown?

Still, I can conceive of worse legislative arrangements for ecclesiastical affairs in Scotland than even the continuance of that Erastian system. I admit that, as a citizen of the British Empire, I am responsible for that continuance in so far as I can help towards preventing it in a right manner. But I feel that, on the other hand, I am equally responsible for any destructive or injurious legislation which might be reasonably founded on what I might be tempted to join in saying or doing. The British Legislature might agree to a disestablishment measure which would leave behind it no legislative testimony to the value of religious truth, and no protection for our Presbyterian system as the national system of our country. I do not see how consistent supporters of the Claim of Right can allow themselves to incur the smallest measure of responsibility for such a consummation. And I do not see how such a responsibitity is to be avoided, if we give our support to disestablishment, without insisting that, in any enactment regarding the existing connection, there shall either be clauses which shall preserve the testimony and protection I speak of, or such a wording of new legislation as shall leave the old untouched to that effect. If there be no good prospect of approaching Parliament successfully with an application thus qualified, then I think that we should let Parliament alone in the meantime, and exert ourselves towards instructing the nation in the principles of our Claim, and towards bringing

the separated sections of our Scottish Presbyterianism into greater harmony of thought and action.

The principles of our Claim might, in circumstances unfavourable to re-establishment, be applied to an enactment which should *recognise* our Presbyterian doctrine and discipline as a national inheritance, while it left the question of re-establishment open for consideration at some future time, when there might be a more united opinion on the subject. I do not see how the Free Church can be consistently a party to any proposals for disestablishment which do not include the *recognition* I speak of, either by the clauses of enactment or by the manner in which important parts of old legislation are explained and left untouched. As a believer in the whole doctrine, religious and constitutional, which I have been striving to illustrate, I do not see my way to ask Parliament to legislate in utter neglect of that doctrine. If there be no fair prospect of inducing Parliament to attend to it, I think we ought to bend our energies towards enlightening and stirring up the Scottish people on the subject.

3. The Language of the Claim of Right requires us to Strive and Pray that the Benefits of a Church Establishment, according to the Sagacious Conceptions and Lofty Aspirations of Dr. Chalmers, may be secured for the Scottish Nation.

I not only admit, but strenuously maintain this

obligation. I keep in mind, at the same time, that the Claim was not a Claim simply for a Church representing one section of the community, *but a Claim for the Scottish nation.* The kind of Establishment for which Chalmers strove, and of which he saw the bright prospect from 1834 till 1838, was a great and growing national institution, gathering round it the population everywhere, and commanding general help and sympathy from the wealthier portions of the community. The Claim of Right binds us to do all we can to forward the restoration of a state of things in which this bright prospect can be realised. Such a restoration requires that a prevailing and influential majority of the Presbyterian population shall embrace and steadfastly adhere to the principles of our Claim. Existing circumstances preclude the expectation of this result until, either by larger interchange of sentiment the ministers, elders, and members of the several Churches shall, by God's blessing, have been brought to see more eye to eye, or by the thorough working of some one of the churches for her Master's cause throughout the land, she shall be enabled to rally round her a considerably larger proportion of intelligent and zealous adherents than that to which she has already attained. In place of one-third or even more of the population, a number considerably greater than a majority of the Presbyterians would be requisite to put any one of the churches in a position to act for

herself and the nation, apart from the other denominations. This is an objection to the inference that would naturally arise otherwise from the Claim of Right—namely, that the Free Church should be substituted for the existing Establishment. I cannot possibly advocate that substitution at present. It would not realise the idea of Dr. Chalmers by making a truly national Establishment. It would only place the Free Church in an invidious position and destroy her influence.

As matters stand, there are three denominations whose relative position is such that no two of them can unite for the purpose of securing a national Establishment on the principles of Dr. Chalmers. The United Presbyterians would not join in asking for it, because most of them hold a conscientious principle against it. The Free Church Formula binds her adherents to a view in conformity to the scriptural doctrine of the Claim of Right, which the ministers and elders of the Established Church could not subscribe without condemning their own conduct during the time that they have hitherto held office. The Free Church could not consistently abandon a Formula which was forced upon her by the denial during the Disruption conflict of what she considers the plain interpretation of the Confession of Faith on the subject of her distinct government. Especially, she could not do so in any connection with the State—a thing which, after past experience, she would

feel herself compelled to encompass with every available guard against Erastianism.

Then even if all these difficulties could be overcome, I do not believe that at present any party of our statesmen would be ready to recognise or allow the principles of our Claim, when they came to see what these principles really involve. I think that our principle of co-ordinate jurisdiction would be too strongly resisted by portions of the community, to afford any opportunity for its being entertained along with sufficient power to secure its adoption by Parliament. The study of the Claim of Right, therefore, leads, I think, to the conclusion, that the duty of the Free Church of Scotland is not at present to approach the Legislature, but to take every opportunity and means for bringing home to the apprehensions and convictions of her own adherents, and of the Scottish nation generally, the important truths and reasonings on which that Claim was based.

The idea that the difficulties of the Scottish ecclesiastical situation can be adjusted by any partial legislation, with a view to reconciling the Free Church to the present Establishment, is out of the question. The Free Church claims a rightful inheritance for herself and for the country. I think that, until she gain this object of her Claim, she should continue as a protesting Church, while prayerfully watching for any opportunity which may occur in the order of God's good providence for bringing together

the great body of leal-hearted Presbyterians in our country. Keeping an earnestly expectant eye upon the entire accomplishment in the end of all that Dr. Chalmers desired, let us not allow ourselves to be allured by any mere outward semblance of his conceptions which politicians may present to us; but let us be content to wait, and let us exhort a coming generation to wait, until the full meaning of it can be realised, as the result of an harmonious desire on the part of a thoroughly united and comprehensive Presbyterian Church.

CONCLUSION.

WHILE the principles involved in the Free Church Claim of Right are of great importance toward the advancement of Christ's cause, I am acutely alive to the truth, that they are secondary in value to the great end towards which the maintenance of all such principles ought to be directed. I feel strongly that the salvation of souls, and the edification of the Church through the spiritual force of the Divine Word, and the working of the Holy Spirit in answer to believing prayer, are objects upon which our hearts should be so supremely set as to make the differences between our Presbyterian Churches appear as nothing in comparison. I desire to see all manner of co-operation between my own Church, the Established Church, and the United Presbyterian Church, in true Christian work for the honour of the Lord Jesus, the conversion of sinners, and stirring up the hearts of believers. I believe that such co-operation would be the best means for drawing us together even with reference to our disputed questions.

I long to get away from ecclesiastical discussions into

a higher spiritual atmosphere. I think of myself, in such a publication as the present, in the light rather of a hewer of wood or a drawer of water for the Church, than as one exercising a function of superior value. But I am persuaded that the discharge of that inferior part has become an imperative duty in the existing circumstances of the Churches and the country.

APPENDIX.

I. The Claim, Declaration, and Protest anent the Encroachments of the Court of Session. Act XIX., Assembly 1842.

N.B.—*The figures here attached to the Claim are employed to facilitate the references in the preceding Vindication, and correspond to what are there called its Paragraphs.*

The General Assembly of the Church of Scotland, **1.** taking into consideration the solemn circumstances in which, in the inscrutable providence of God, this Church is now placed; and that, notwithstanding the securities for the Government thereof by General Assemblies, Synods, Presbyteries, and Kirk-Sessions, and for the liberties, government, jurisdiction, discipline, rights, and privileges of the same, provided by the statutes of the realm, by the constitution of this country, as unalterably settled by the Treaty of Union, and by the oath, "inviolably to maintain and preserve" the same, required to be taken by each Sovereign at accession, as a condition precedent to the exercise of the royal authority;—which securities might well seem, and had long been thought, to place the said liberties, government, jurisdiction, discipline, rights, and privileges, of

this Church, beyond the reach of danger or invasion ;—these have been of late assailed by the very Court to which the Church was authorised to look for assistance and protection, to an extent that threatens their entire subversion, with all the grievous calamities to this Church and nation which would inevitably flow therefrom ;—did and hereby do solemnly, and in reliance on the grace and power of the Most High, resolve and agree on the following Claim, Declaration, and Protest: That is to say :—

2. WHEREAS it is an essential doctrine of this Church, and a fundamental principle in its constitution, as set forth in the Confession of Faith thereof, in accordance with the Word and law of the most holy God, that "there is no other Head of the Church but the Lord Jesus Christ" (ch. xxv. sec. 6) ; and that, while "God, the supreme Lord and King of all the world, hath ordained civil magistrates to be under him over the people, for his own glory, and the public good, and to this end hath armed them with the power of the sword" (ch. xxiii. sec. 1) ; and while "it is the duty of people to pray for magistrates, to honour their persons, to pay them tribute and other dues, to obey their lawful commands, and to be subject to their authority for conscience' sake," "from which ecclesiastial persons are not exempted" (ch. xxiii. sec. 4) ; and while the magistrate hath authority, and it is his duty, in the exercise of that power which alone is committed to him, namely, "the power of the sword," or civil rule, as distinct from the "power of the keys," or spiritual authority, expressly denied to him, to take order for the preservation of purity, peace, and unity in the Church, yet "The Lord Jesus, as King and Head of his Church, hath therein appointed a government in the hand of Church officers distinct from the civil magistrate" (ch. xxx. sec. 1) ; which government is ministerial, not lordly, and to be exercised in

consonance with the laws of Christ, and with the liberties of his people:

And whereas, according to the said Confession, and to the other standards of the Church, and agreeably to the Word of God, this government of the Church, thus appointed by the Lord Jesus, in the hand of Church officers, distinct from the civil magistrate or supreme power of the State, and flowing directly from the Head of the Church to the office-bearers thereof, to the exclusion of the civil magistrate, comprehends, as the objects of it, the preaching of the Word, administration of the Sacraments, correction of manners, the admission of the office-bearers of the Church to their offices, their suspension and deprivation therefrom, the infliction and removal of Church censures, and, generally, the whole "power of the keys," which, by the said Confession, is declared, in conformity with Scripture, to have been "committed" (ch. xxx. sec. 2) to Church officers, and which, as well as the preaching of the Word and the administration of the Sacraments, it is likewise thereby declared, that "the civil magistrate may not assume to himself" (ch. xxiii. sec. 3): 3.

And whereas this jurisdiction and government, since it regards only spiritual condition, rights, and privileges, doth not interfere with the jurisdiction of secular tribunals, whose determinations as to all temporalities conferred by the State upon the Church, and as to all civil consequences attached by law to the decisions of Church Courts in matters spiritual, this Church hath ever admitted, and doth admit, to be exclusive and ultimate, as she hath ever given and inculcated implicit obedience thereto: 4.

And whereas the above-mentioned essential doctrine and fundamental principle in the constitution of the Church, and the government and exclusive jurisdiction flowing therefrom, founded on God's Word, and set forth in the Confession of 5.

Faith and other standards of this Church, have been, by diverse and repeated Acts of Parliament, recognised, ratified, and confirmed;—inasmuch as,—

First, The said Confession itself, containing the doctrine and principles above set forth, was "ratified and established, and voted and approven as the public and avowed Confession of this Church," by the fifth Act of the second session of the first Parliament of King William and Queen Mary, entituled, "Act ratifying the Confession of Faith, and Settling Presbyterian Church Government" (1690, c. 5): to which Act the said Confession is annexed, and with it incorporated in the statute law of this kingdom.

Second, By an Act passed in the first Parliament of King James VI., entituled, "Of admission of ministers: of laic patronages" (1567, c. 7), it is enacted and declared, "That the examination and admission of ministers within this realm be only in the power of the Kirk, now openly and publicly professed within the same;" and while the "presentation of laic patronages" was thereby "reserved to the just and ancient patrons," it was provided, that, if the presentee of a patron should be refused to be admitted by the inferior ecclesiastical authorities, it should be lawful for the patron "to appeal to the General Assembly of the whole realm, by whom the cause being decided, shall take end as they decern and declare."

Third, By an Act passed in the same first Parliament, and renewed in the sixth Parliament of the said King James VI., entituled, "Anent the jurisdiction of the Kirk" (1567, c. 12. *Fol. Edit.*), the said Kirk is declared

to have jurisdiction "in the preaching of the true Word of Jesus Christ, correction of manners, and administration of the holy sacraments" (1579, c. 69); and it is further declared, "that there be *no other jurisdiction ecclesiastical* acknowledged within this realm, other than that *which is and shall be within the same Kirk, or that flows therefrom, concerning the premises;*" which Act, and that last before mentioned, were ratified and approven by another Act passed in the year, 1581, entituled, "Ratification of the liberty of the true Kirk of God and religion, with confirmation of the laws and Acts made to that effect of before" (1581, c. 99); which other Act, and all the separate Acts therein recited, were again revived, ratified, and confirmed by an Act of the twelfth Parliament of the said King James VI., entituled, "Ratification of the liberty of the true Kirk," &c. (1592, c. 116); which said Act (having been repealed in 1662) was revived, renewed, and confirmed by the before-mentioned statute of King William and Queen Mary (1690, c. 5).

Fourth, The said Act of the twelfth Parliament of King James VI., ratified and approved the General Assemblies, Provincial Synods, Presbyteries, and Kirk-Sessions "appointed by the Kirk" (1592, c. 116), and "the whole jurisdiction and discipline of the same Kirk;" cassed and annulled "all and whatsoever acts, laws, and statutes, made at any time before the day and date thereof, against the liberty of the true Kirk, jurisdiction and discipline thereof, as the same is used and exercised within this realm;" appointed presentations to benefices to be directed to Presbyteries, "with full power to give collation thereupon, and to put order to all matters and

causes ecclesiastical within their bounds, according to the discipline of the Kirk, providing the foresaid Presbyteries be bound and astricted to receive and admit whatsoever qualified minister, presented by his Majesty or laic patrons" (the effect of which proviso and of the reservation in the Act of the first Parliament of King James VI., above mentioned (1567, c. 7), is hereinafter more fully adverted to); and farther declared that the jurisdiction of the Sovereign and his Courts, as set forth in a previous Act (1584, c. 129), to extend over all persons his subjects, and "in all matters," should "noways be prejudicial nor derogate anything to the privilege that *God has given* to the spiritual office-bearers of the Kirk, concerning *heads of religion, matters of heresy, excommunication, collation, or deprivation of ministers, or any such like essential censures*, grounded and having warrant of the Word of God;" by which enactment, declaration, and acknowledgment, the State recognised and established as a fundamental principle of the constitution of the kingdom, that the jurisdiction of the Church in these matters was "given by God" to the office-bearers thereof, and was exclusive, and free from coercion by any tribunals holding power or authority from the State or supreme civil magistrate.

Fifth, The Parliament holden by King Charles II. (1662, c. 1), immediately on his restoration to the throne, while it repealed the above recited Act of the twelfth Parliament of King James, and other relative Acts (1592, c. 116), at the same time acknowledged the supreme and exclusive nature of the jurisdiction thereby recognised to be in the Church, describing the said Acts, as Acts "by which the *sole and only* power and jurisdiction

within this Church *doth stand in the Church*, and in the general, provincial, and presbyterial assemblies and kirk-sessions," and as Acts "which may be interpreted to have given any Church power, jurisdiction, or government to the office-bearers of the Church, their respective meetings, other than that which acknowledgeth a dependence upon, and subordination to, the sovereign power of the King, as supreme."

Sixth, The aforesaid Act of King William and Queen Mary (1690, c. 5),—on the narrative that their Majesties and the estates of Parliament conceived "it to be their bounden duty, after the great deliverance that God hath lately wrought for this Church and kingdom, *in the first place*, to settle and secure therein the true Protestant religion, according to the truth of God's Word, as it hath of a long time been professed within this land; as also, the government of Christ's Church within this nation, agreeable to the Word of God, and most conducive to true piety and godliness, and the establishing of peace and tranquillity within this realm," —besides ratifying and establishing as aforesaid the Confession of Faith, did also "establish, ratify, and confirm the Presbyterian Church government and discipline; that is to say, *the government of the Church by Kirk-Sessions, Presbyteries, Provincial Synods, and General Assemblies*, ratified and established by the 116 Act of James VI., Parliament 12, anno 1592, entituled, 'Ratification of the liberty of the true Kirk,' &c. (1592, c. 116), and thereafter received by the general consent of this nation, *to be the only government of Christ's Church within this kingdom;*" and revived and confirmed the said Act of King James VI.

6. And whereas, not only was the exclusive and ultimate jurisdiction of the Church Courts, in the government of the Church, and especially in the particular matters, spiritual and ecclesiastical, above mentioned, recognised, ratified, and confirmed—thus necessarily implying the denial of power on the part of any secular tribunal, holding its authority from the Sovereign, to review the sentence of the Church Courts in regard to such matters, or coerce them in the exercise of such jurisdiction;—but all such power, and all claim on the part of the Sovereign to be considered supreme governor over the subjects of this kingdom of Scotland in causes *ecclesiastical and spiritual*, as he is in causes *civil and temporal*, was after a long continued struggle, finally and *expressly repudiated and cast out of the constitution* of Scotland, *as inconsistent with the Presbyterian Church government* established at the Revolution, and thereafter unalterably secured by the Treaty of Union with England; by the constitution of which latter kingdom, differing in this respect from that of Scotland, the Sovereign is recognised to be supreme governor, "*as well* in all *spiritual and ecclesiastical* things and causes as *temporal:*" Thus:—

First, The General Assembly having, in the year 1582, proceeded to inflict the censures of the Church upon Robert Montgomery, minister of Stirling, for seeking to force himself, under a presentation from the King, into the archbishopric of Glasgow, contrary to an act of the General Assembly discharging the office of Prelatic bishop in the Church, and for appealing to the secular tribunals against the infliction of Church censures by the Church Courts, and seeking to have these suspended and interdicted—and having deposed and excommunicated him, notwithstanding of an interdict pronounced

by the Privy Council of Scotland, the then supreme secular court of the kingdom—and having at the same time declared it to be part of the subsisting discipline of the Church, that any ministers thereof who "should seek any way by the civil power to exempt and withdraw themselves from the jurisdiction of the Kirk, or procure, obtain, or use any letters or charges, &c., to impair, hurt, or stay the said jurisdiction, discipline, &c., or to make any appellation from the General Assembly to stop the discipline or order of the eeclesiastical policy or jurisdiction granted by God's Word to the office-bearers within the said Kirk," were liable to the highest censures of the Church; although their sentence of excommunication was declared by one of the Acts of Parliament of the year 1584, commonly called the "Black Acts," to be void, yet ultimately the King and Privy Council abandoned their interference. Montgomery submitted to the Church Courts, and the statute of the twelfth Parliament of King James VI., already mentioned (1592, c. 116), cassed and annulled "all and whatsoever acts, laws, and statutes made at any time before the day and date thereof, against the liberty of the true Kirk, jurisdiction and discipline thereof, *as the same is used and exercised within this realm;*" since which enactment, no similar interference with the discipline and censures of the Church was ever attempted till the year 1841.

Second, It having been declared by another of the "Black Acts" aforesaid (1584, c. 129), entituled, "An Act confirming the King's Majesty's royal power over all the estates and subjects within this realm," that "his Highness, his heirs and successors, by themselves and their councils,

are, and in time to come shall be, judges competent to all persons his Highness' subjects, of whatsoever estate, degree, function, or condition that ever they be of, spiritual or temporal, *in all matters* wherein they or any of them, shall be apprehended, summoned, or charged to answer to such things as shall be inquired of them by our sovereign lord and his council," it was, by the said before-mentioned Act of the twelfth Parliament of King James VI. (1592, c. 116), declared that the said Act last above mentioned "shall noways be prejudicial, nor derogate any thing to the privilege that God has given to the spiritual office-bearers of the Kirk, concerning heads of religion, matters of heresy, excommunication, collation, or deprivation of ministers, or any such like essential censures, specially grounded and having warrant of the Word of God."

Third, It having been enacted, on the establishment of Prelacy in 1612 (1612, c. 1), that every minister, at his admission, should swear obedience to the Sovereign as "the only lawful supreme governor of this realm, as well in matters spiritual and ecclesiastical as in things temporal," the enactment to this effect was repealed on the restoration of Presbyterian Church government (1640, c. 7).

Fourth, A like acknowledgment, that the Sovereign was "the only supreme governor of this kingdom over all persons *and in all causes*" (1661, c. 11), having been, on the second establishment of Prelacy consequent on the restoration of King Charles II., required as part of the ordinary oath of allegiance, and having been also inserted into the "Test Oath" (1681, c. 6), so tyrannically attempted to be forced on the subjects of this realm during the reigns of Charles II. and James II.,

and the same doctrine of the King's supremacy in all causes, spiritual and ecclesiastical, as well as temporal and civil, having farther been separately and specially declared by the first Act of the second Parliament of the said King Charles II. (1669, c. 1), entituled, "Act asserting his Majesty's supremacy over all persons and in all causes ecclesiastical," whereby it was "enacted, asserted, and declared, that his Majesty hath the supreme authority and supremacy over all persons, and in all causes ecclesiastical, within this kingdom" (Estates, 1689, c. 18),—the Estates of this kingdom, at the era of the Revolution, did set forth, as the second article of the "Grievances" of which they demanded redress under their "Claim of Right," "That the first Act of Parliament 1669 is inconsistent with the establishment of Church government now desired, and ought to be abrogated."

Fifth, In compliance with this claim, an Act was immediately thereafter passed (1690, c. 1), of which the tenor follows:—"Our Sovereign Lord and Lady the King and Queen's Majesties, taking into their consideration that, by the second article of the Grievances presented to their Majesties by the estates of this kingdom, it is declared, that the first Act of the second Parliament of King Charles the Second, entituled, 'Act asserting his Majesty's supremacy over all persons and in all causes ecclesiastical,' is inconsistent with the establishment of the Church government now desired, and ought to be abrogated: Therefore their Majesties, with advice and consent of the estates of Parliament, do hereby abrogate, rescind, and annul the foresaid Act, and declare the same, in the whole heads, articles, and clauses thereof,

to be of no force or effect in all time coming." In accordance also therewith, the oath of allegiance above mentioned, requiring an acknowledgment of the King's sovereignty "in *all* causes" (1689, c. 2), was done away, and that substituted which is now in use, simply requiring a promise to be "faithful, and bear true allegiance" to the sovereign; and all preceding laws and Acts of Parliament were rescinded, "in so far as they impose any other oaths of allegiance and supremacy, declarations and tests, excepting the oath *de fideli.*" By the which enactments any claim on the part of the Sovereigns of Scotland to be supreme rulers in spiritual and ecclesiastical, as well as in temporal and civil causes, or to possess any power, by themselves or their judges holding commission from them, to exercise jurisdiction in matters or causes spiritual and ecclesiastical, was repudiated and excluded from the constitution, as inconsistent with the Presbyterian Church government then established, and secured under the statutes then and subsequently passed, "to continue, without any alteration, to the people of this land, in all succeeding generations" (1706, c. 6).

7. And whereas, diverse civil rights and privileges were, by various statutes of the Parliament of Scotland, prior to the Union with England, secured to this Church, and certain civil consequences attached to the sentences of the Courts thereof, which were farther directed to be aided and made effectual by all magistrates, judges, and officers of the law; and in particular:—

It was by an Act of the twelfth Parliament of King James VI. (1592, c. 117), enacted, "That all and whatsoever sentences of deprivation, either pronounced

already, or that happens to be pronounced hereafter by the Presbytery, Synodal or General Assemblies, against any parson or vicar within their jurisdiction, provided since his Highness' coronation, is, and shall be repute in all judgments, a just cause to seclude the person before provided, and then deprived, from all profits, commodities, rents, and duties of the said parsonage and vicarage, or benefice of cure; and that either by way of action, exception, or reply; and that the said sentence of deprivation shall be a sufficient cause to make the said benefice to vaike thereby:"

As also, by the fifth Act of the first Parliament of King William and Queen Mary (1690, c. 5), it was enacted, "that whatsoever ministers, being convened before the said general meeting, and representatives of the Presbyterian ministers or elders, or the visitors to be appointed by them, shall either prove contumacious for not appearing, or be found guilty, and shall be therefor censured, whether by suspension or deposition, they shall, *ipso facto*, be suspended from or deprived of their stipends and benefices:"

As also, by an Act passed in the fourth session of the first Parliament of King William and Queen Mary (1693, c. 22), entituled, an "Act for settling the peace and quiet of the Church," it was provided, that no minister should be admitted, unless he owned the Presbyterian Church government, as settled by the last recited Act, "to be the only government of this Church;" "and that he will submit thereto, and concur therewith, and never endeavour, directly or indirectly, the prejudice or subversion thereof;" and it was statute or ordained, "that the lords of their Majesties' Privy Council, and all other

magistrates, judges, and officers of justice, give all due assistance for making the sentences and censures of the Church, and judicatories thereof, to be obeyed, or otherwise effectual as accords :"

As also, by an Act passed in the fifth session of the foresaid Parliament (1695, c. 22), entituled an "Act against intruding into churches without a legal call and admission thereto," on the narrative, "that ministers and preachers, their intruding themselves into vacant churches, possessing of manses and benefices, and exercising any part of the ministerial sanction in parishes, without a legal call and admission to the said churches, is an high contempt of the law, and of a dangerous consequence, tending to perpetual schism;" such intrusion, without an orderly call from the heritors and elders—the right of presentation by patrons being at this time abolished —and "legal admission from the Presbytery," was prohibited under certain penalties; and the Lords of the Privy Council were recommended to remove all who had so intruded, and "to take some effectual course for stopping and hindering those ministers who are, or shall be hereafter deposed by the judicatories of the present Established Church from preaching or exercising any act of their ministerial function, which" (the said statute declares) "they cannot do after they are deposed, without a high contempt of the authority of the Church, and of the laws of the kingdom establishing the same."

8. And whereas, at the Union between the two kingdoms, the Parliament of Scotland, being determined that the "true Protestant religion," as then professed, "with the worship, discipline, and government of this Church, should be effectually

and unalterably secured," did, in their Act appointing commissioners to treat with commissioners from the Parliament of England (1705, c. 4), as to an union of the kingdoms, provide "That the said commissioners shall *not* treat of or concerning any alteration of the worship, discipline, and government of the Church of this kingdom, as now by law established;" and did, by another Act, commonly called the Act of Security (1706, c. 6), and entituled, "Act for securing the Protestant religion and Presbyterian Church government," establish and confirm the said true Protestant religion, and the worship, discipline, and government of this Church, to continue without any alteration to the people of this land in all succeeding generations;" and did "for ever confirm the fifth Act of the first Parliament of King William and Queen Mary" (1690, c. 5), entituled, "Act ratifying the Confession of Faith, and settling Presbyterian Church government, *and the whole other Acts of Parliament relating thereto;*" and did "expressly provide and declare, That the foresaid true Protestant religion, contained in the above-mentioned Confession of Faith, with the form and purity of worship presently in use within this Church, and its Presbyterian Church government and discipline,—that is to say, the government of the Church by Kirk-Sessions, Presbyteries, Provincial Synods, and General Assemblies, all established by the foresaid Acts of Parliament, pursuant to the Claim of Right, shall remain and continue unalterable; and that the said Presbyterian government shall be the only government of the Church within the kingdom of Scotland:" And farther, "for the greater security of the same," did, *inter alia*, enact, "That, after the decease of her present Majesty, the sovereign succeeding to her in the royal government of the kingdom of Great Britain, shall, in all time coming, at his or her accession to the crown, swear and subscribe, That they

shall inviolably maintain and preserve the foresaid settlement of the true Protestant religion, with the government, worship, discipline, rights and privileges of this Church as above established by the laws of this kingdom, in prosecution of the Claim of Right;" which said Act of Security, "with the establishment therein contained," it was specially thereby enacted, "should be held and observed in all time coming as a fundamental and essential condition of any treaty of union to be concluded betwixt the two kingdoms, *without any alteration thereof, or derogation thereto, in any sort, for ever:*" It being farther thereby provided, that "the said Act and settlement therein contained shall be insert and repeated in any Act of Parliament that shall pass for agreeing and concluding the foresaid treaty of union betwixt the two kingdoms; and that the same shall be therein expressly declared to be a fundamental and essential condition of the said Treaty of Union in all time coming." In terms of which enactment, this Act of Security was inserted in the Treaty of Union between the two kingdoms, as a fundamental condition thereof, and was also inserted in the Act (1706, c. 7) of the Parliament of Scotland ratifying and approving of the said Treaty, and likewise in the corresponding Act of the Parliament of England, entituled, "An Act (5 Anne, c. 8) for a Union of the two kingdoms of England and Scotland:"

9. And whereas, at the date of the said Treaty of Union, the right of patrons to present to churches stood abolished by statute, after the following manner—viz., By the Act of King William and Queen Mary (1690, c. 5), herein before mentioned, the Act of James VI. (1592, c. 116), also herein before mentioned, then standing totally repealed, was only revived, subject to the express exception of "that part of it relating to patronages," which consequently remained repealed and unre-

stored, and "which," the Act 1690, c. 5, farther bore, "is hereafter to be taken into consideration." The part of the said Act thus left repealed and unrevived was the provision, that Presbyteries "be bound and astricted to receive whatsoever qualified minister presented by his Majesty or laic patrons," —a provision which, while it subsisted, was held to leave the Church free to proceed in the collation of ministers, "according to the discipline of the Kirk;" and non-compliance with which implied only a forfeiture of the fruits of the particular benefice, which it did by virtue of the immediately succeeding statute 1592, c. 117, whereby it was enacted, that, "in case the Presbytery *refuses* to admit any *qualified* minister presented to them by the patron, it shall be lawful to the patron to retain the whole fruits of the benefice in his own hands." This subject having accordingly been thereafter taken into consideration in the same session of Parliament, was definitely settled by an Act (1690, c. 23), entituled, "Act concerning Patronages," whereby the right of presentation by patrons was "annulled and made void," and a right was vested in the heritors and elders of the respective parishes "to *name* and *propose* the person to the whole congregation, to be approven or disapproven by them," the disapprovers giving in their reasons "to the effect the affair may be cognosced upon by the Presbytery of the bounds, at whose judgment, and by whose determination" (as is declared by the said Act), "*the calling and entry* of a particular minister is to be ordered and concluded:"

And whereas the said Act last mentioned formed part of **10.** the settlement of the Presbyterian Church government effected at the Revolution, and was one of the "Acts relating thereto," and to the statute 1690, c. 5, specially confirmed and secured by the Act of Security and Treaty of Union; yet, notwithstanding thereof, and of the said Treaty, the Parliament of

Great Britain, by an Act passed in the 10th of Queen Anne (10 Anne, c. 12), repealed the said Act, "in so far as relates to the presentation of ministers by heritors and others therein mentioned," and restored to patrons the right of presentation, and enacted that Presbyteries should be "obliged to receive and admit in the same manner such qualified person or persons, minister or ministers, as shall be presented by the respective patrons, as the persons or ministers presented before the making of this Act ought to have been admitted:"

11. And whereas, while this Church protested against the passing of the above-mentioned Act of Queen Anne, as "contrary to the constitution of the Church, so well secured by the late Treaty of Union, and solemnly ratified by Acts of Parliament in both kingdoms," and for more than seventy years thereafter uninterruptedly sought for its repeal, she at the same time maintained, and practically exercised, without question or challenge from any quarter, the jurisdiction of her Courts to determine ultimately and exclusively, under what circumstances they would admit candidates into the office of the holy ministry, or constitute the pastoral relationship between minister and people, and generally, "to order and conclude the entry of particular ministers:"

12. And whereas, in particular, this Church required, as necessary to the admission of a minister to the charge of souls, that he should have received a call from the people over whom he was to be appointed, and did not authorise or permit any one so to be admitted till such call had been sustained by the Church Courts, and did, before and subsequent to the passing of the said Act of Queen Anne, declare it to be a fundamental principle of the Church, as set forth in her authorised standards, and particularly in the Second Book of Discipline (ch. iii. sec. 5), repeated by Act of Assembly in 1638, that no pastor be

intruded upon any congregation contrary to the will of the people :

And whereas, in especial, this fundamental principle was, by the 14th Act of the General Assembly 1736 (c. 14), re-declared, and directed to be attended to in the settlement of vacant parishes, but having been, after some time, disregarded in the administration of the Church, it was once more re-declared by the General Assembly 1834 (c. 9), who established certain specific provisions and regulations for carrying it into effect in time to come : 13.

And whereas, by a judgment pronounced by the House of Lords, in 1839,[1] it was, for the first time, declared to be illegal to refuse to take on trial, and to reject the presentee of a patron (although a layman, and merely a candidate for admission to the office of the ministry), in consideration of this fundamental principle of the Church, and in respect of the dissent of the congregation ; to the authority of which judgment, so far as disposing of civil interests, this Church implicitly bowed, by at once abandoning all claim to the *jus devolutum*,—to the benefice, for any pastor to be settled by her,—and to all other civil right or privilege which might otherwise have been competent to the Church or her Courts ; and anxiously desirous, at the same time, of avoiding collision with the Civil Courts, she so far suspended the operation of the above-mentioned Act of Assembly, as to direct all cases in which dissents should be lodged by a majority of the congregation, to be reported to the General Assembly, in the hope that a way might be opened up to her for reconciling with the civil rights declared by the House of Lords, adherence to the above-mentioned fundamental principle, which she could not violate or abandon, by admitting to the holy office of the ministry a party not having, in her con- 14.

[1] Auchterarder Case, 1839.

scientious judgment, a legitimate call thereto, or by intruding a pastor on a reclaiming congregation contrary to their will; and farther, addressed herself to the Government and the Legislature for such an alteration of the law (as for the first time now interpreted), touching the temporalities belonging to the Church (which alone she held the decision of the House of Lords to be capable of affecting or regulating), as might prevent a separation between the cure of souls and the benefice thereto attached:

15. And whereas, although during the century which elapsed after the passing of the said Act of Queen Anne, Presbyteries repeatedly rejected the presentees of patrons on grounds undoubtedly *ultra vires* of the Presbyteries, as having reference to the title of the patron or the validity of competing presentations, and which were held by the Court of Session to be contrary to law, and admitted others to the pastoral office in the parishes presented to, who had no presentation or legal title to the benefice, the said Court, even in such cases, never attempted or pretended to direct or coerce the Church Courts, in the exercise of their functions in regard to the collation of ministers, or other matters acknowledged by the State to have been conferred on the Church, not by the State, but by God himself. On the contrary, they limited these decrees to the regulation and disposal of the temporalities which were derived from the State, and which, as the proper subjects of "actions civil," were within the province assigned to the Court of Session, by the Constitution refusing to interfere with the peculiar functions and exclusive jurisdiction of the Courts of the Church. Thus,—

In the case of Auchtermuchty,[1] where the Presbytery had wrongfully admitted another than the patron's presentee, the Court found "That the *right to a stipend* is a civil

[1] Moncreiff *v.* Maxton, Feb. 15, 1735.

right; and *therefore* that the Court have power to cognosce and determine upon the legality of the admission of ministers *in hunc effectum,* whether the *person admitted* shall have right to the *stipend* or not; and simply decided, that the patron was entitled to retain the stipend in his own hands.

So also, the same course was followed in the cases of Culross, Lanark, and Forbes;[1] in reference to one of which (that of Lanark), the Government of the country, on behalf of the Crown, in which the patronage was vested, recognised the retention of stipend by the patron, as the only competent remedy for a wrongful refusal to admit his presentee; the Secretary of State having, in a letter to the Lord Advocate of Scotland (January 17, 1752), signified the pleasure of his Majesty, "directing and ordering his lordship to do everything necessary and competent by law, for asserting and taking benefit in the present case of the said right and privilege of patrons by the law of Scotland to retain the fruits of the benefice in their own hands till their presentee be admitted."

So farther, in the before-mentioned case of Culross,[2] the Court refused, "as incompetent," a bill of advocation presented to them by the patron, for the purpose of staying the admission by the Presbytery of another than his presentee.

So likewise, in the case of Dunse,[3] the Court would not interfere in regard to a conclusion to prohibit the Presbytery "to moderate in a call at large, or settle

[1] Cochrane *v.* Stoddart, June 26, 1751. Dick *v.* Carmichael, March 2, 1753. Forbes *v.* M'William, February, 1762.

[2] Cochrane, November 19, 1748.

[3] Hay *v.* Presbytery of Dunse, February 26, 1749.

any other man," because "that was interfering with the power of ordination, or internal policy of the Church, with which the Lords thought they had nothing to do."

And so, in the same manner, in the case of Unst,[1] where the party concluded to have the Presbytery ordained to proceed to the presentee's settlement as well as to have the validity of the presentation and the right to the stipend declared, the Court limited their decree to the civil matters of the presentation and stipend.

16. And whereas, pending the efforts of the Church to accomplish the desired alteration of the law, the Court of Session,—a tribunal instituted by special Act of Parliament for the specific and limited purpose of "doing and administration of justice in all *civil actions*" (1537, c. 36), with judges appointed simply "to sit and decide upon all *actions civil*" (1532, c. 1),—not confining themselves to the determination of "civil actions,"—to the withholding of civil consequences from sentences of the Church Courts, which, in their judgment, were not warranted by the statutes recognising the jurisdiction of these Courts,—to the enforcing of the provision of the Act 1592, c. 117, for retention of the fruits of the benefice in case of wrongful refusal to admit a presentee, or the giving of other civil redress for any civil injury held by them to have been wrongfully sustained in consequence thereof,—have, in numerous and repeated instances, stepped beyond the province allotted to them by the Constitution, and within which alone their decisions can be held to declare the law, or to have the force of law, deciding not only "actions civil," but "causes spiritual and ecclesiastical,"—and that, too, even where these had no connection with the exercise of the right of patronage,

[1] Lord Dundas *v.* Presbytery of Shetland, May 15, 1795.

—and have invaded the jurisdiction, and encroached upon the spiritual privileges of the Courts of this Church, in violation of the constitution of the country—in defiance of the statutes above mentioned, and in contempt of the laws of this kingdom: as for instance—

By interdicting Presbyteries of the Church from admitting to a pastoral charge,[1] when about to be done irrespective of the civil benefice attached thereto, or even where there was no benefice—no right of patronage—no stipend—no manse or glebe, and no place of worship, or any patrimonial right, connected therewith.[2]

By issuing a decree,[3] requiring and ordaining a Church Court to take on trial and admit to the office of the holy ministry, in a particular charge, a probationer or unordained candidate for the ministry, and to intrude him also on the congregation, contrary to the will of the people;—both in this, and in the cases first mentioned, invading the Church's exclusive jurisdiction in the admission of ministers, the preaching of the Word, and administration of Sacraments—recognised by statute to have been "given by God" directly to the Church, and to be beyond the limits of the secular jurisdiction.

By prohibiting the communicants[4] of the Church from intimating their dissent from a call proposed to be given to a candidate for the ministry to become their pastor.

By granting interdict against the establishment of additional ministers to meet the wants of an increasing population,[5] as uninterruptedly practised from the Reformation to this day: against constituting a new kirk-session in a

[1] 1st Lethendy Case. [2] Stewarton Case. [3] Marnoch Case.
[4] Daviot Case. [5] Stewarton Case.

parish, to exercise discipline; and against innovating on its existing state, "as regards pastoral superintendence, its kirk-session, and jurisdiction and discipline thereto belonging."

By interdicting the preaching of the gospel, and administration of ordinances,[1] throughout a whole district, by any minister of the Church under authority of the Church Courts; thus assuming to themselves the regulation of the "preaching of the Word" and "administration of the Sacraments," and at the same time invading the privilege, common to all the subjects of the realm, of having freedom to worship God according to their consciences, and under the guidance of the ministers of the communion to which they belong.

By holding the members of inferior Church judicatories liable in damages[2] for refusing to break their ordination vows and oaths (sworn by them, in compliance with the requirements of the statutes of the realm, and, in particular, of the Act of Security embodied in the Treaty of Union), by disobeying and setting at defiance the sentences, in matters spiritual and ecclesiastical, of their superior Church judicatories, to which, by the constitution of the Church and country, they are, in such matters, subordinate and subject, and which, by their said vows and oaths, they stand pledged to obey.

By interdicting the execution of the sentence of a Church judicatory, prohibiting a minister from preaching or administering ordinances within a particular parish,[3] pending the discussion of a cause in the Church Courts as to the validity of his settlement therein.

[1] Strathbogie Cases.

[2] 2nd Auchterarder Case.

[3] Culsalmond Case.

By interdicting the General Assembly and inferior Church judicatories from inflicting Church censures; as in one case, where interdict was granted against the pronouncing of sentence of deposition upon a minister found guilty of theft, by a judgment acquiesced in by himself;[1] in another, where a Presbytery was interdicted from proceeding in the trial of a minister accused of fraud and swindling;[2] and in a third, where a Presbytery was interdicted from proceeding with a libel against a licentiate for drunkenness, obscenity, and profane swearing.[3]

By suspending Church censures,[4] inflicted by the Church judicatories in the exercise of discipline (which, by special statute, all "judges and officers of justice" are ordered "to give due assistance" for making "to be obeyed, or otherwise effectual"), and so reponing ministers suspended from their office, to the power of preaching and administering ordinances; thus assuming to themselves the "power of the keys."

By interdicting the execution of a sentence of deposition from the office of the holy ministry, pronounced by the General Assembly of the Church;[5] thereby also usurping the "power of the keys," and supporting deposed ministers in the exercise of ministerial functions; which is declared by special statute to be a "high contempt of the authority of the Church, and of the laws of the kingdom establishing the same."

By assuming to judge of the right of individuals elected members of the General Assembly to sit therein,[6] and

[1] Cambusnethan Case.
[2] Stranraer Case.
[3] 4th Lethendy Case.
[4] 1st and 2nd Strathbogie Case.
[5] 3rd Strathbogie Case.
[6] 5th Strathbogie Case.

interdicting them from taking their seats; thus interfering with the constitution of the Supreme Court of the Church, and violating her freedom in the holding of General Assemblies, secured to her by statute.

By, in the greater number of instances above referred to, requiring the inferior judicatories of the Church to disobey the sentences, in matters spiritual and ecclesiastical, of the superior judicatories, to which, by the constitution in Church and State, they are subordinate and subject, and which, in compliance with the provisions of the statutes of the realm, their members have solemnly sworn to obey;—thus subverting "the government of the Church by Kirk-sessions, Presbyteries, Provincial Synods, and General Assemblies," settled by statute and the Treaty of Union, as "the only government of the Church within the kingdom of Scotland."

By all which acts, the said Court of Session, apparently not adverting to the oath taken by the Sovereign, from whom they hold their commissions, have exercised powers not conferred upon them by the Constitution, but by it excluded from the province of any secular tribunal,—have invaded the jurisdiction of the Courts of the Church,—have subverted its government,—have illegally attempted to coerce Church Courts in the exercise of their purely spiritual functions,—have usurped the "power of the keys,"—have wrongfully acclaimed, as the subjects of their civil jurisdiction, to be regulated by their decrees, ordination of laymen to the office of the holy ministry, admission to the cure of souls, Church censures, the preaching of the Word, and the administration of the Sacraments,—and have employed the means intrusted to them for enforcing submission to their lawful

authority, in compelling submission to that which they have usurped,—in opposition to the doctrines of God's Word set forth in the Confession of Faith, as ratified by statute,—in violation of the Constitution,—in breach of the Treaty of Union, and in disregard of divers express enactments of the Legislature :

17. And whereas farther encroachments are threatened on the government and discipline of the Church as by law established,[1] in actions now depending before the said Court, in which it is sought to have sentences of deposition from the office of the holy ministry reduced and set aside,[2] and minorities of inferior judicatories authorised to take on trial and admit to the office of the holy ministry, in disregard of, and in opposition to, the authority of the judicatories of which they are members, and of the superior judicatories to which they are subordinate and subject :

18. And whereas the government and discipline of Christ's Church cannot be carried on according to his laws and the constitution of his Church, subject to the exercise, by any secular tribunal, of such powers as have been assumed by the said Court of Session :

19. And whereas this Church, highly valuing, as she has ever done, her connection, on the terms contained in the statutes herein before recited, with the State, and her possession of the temporal benefits thereby secured to her for the advantage of the people, must, nevertheless, even at the risk and hazard of the loss of that connection and of these public benefits—deeply as she would deplore and deprecate such a result for herself and the nation—persevere in maintaining her liberties as a Church

[1] 4th Strathbogie Case.

[2] 3rd Auchterarder Case. 3rd Lethendy Case.

of Christ, and in carrying on the government thereof on her own constitutional principles, and must refuse to intrude ministers on her congregations, to obey the unlawful coercion attempted to be enforced against her in the exercise of her spiritual functions and jurisdiction, or to consent that her people be deprived of their rightful liberties :

20. THEREFORE, the General Assembly, while, as above set forth, they fully recognise the absolute jurisdiction of the Civil Courts in relation to all matters whatsoever of a civil nature, and especially in relation to all the temporalities conferred by the State upon the Church, and the civil consequences attached by law to the decisions, in matters spiritual, of the Church Courts,—DO, in name and on behalf of this Church, and of the nation and people of Scotland, and under the sanction of the several statutes, and the Treaty of Union herein before recited, CLAIM, as of RIGHT, That she shall freely possess and enjoy her liberties, government, discipline, rights, and privileges, according to law, especially for the defence of the spiritual liberties of her people, and that she shall be protected therein from the foresaid unconstitutional and illegal encroachments of the said Court of Session, and her people secured in their Christian and constitutional rights and liberties.

21. AND they DECLARE, that they cannot, in accordance with the Word of God, the authorised and ratified standards of this Church, and the dictates of their consciences, intrude ministers on reclaiming congregations, or carry on the government of Christ's Church, subject to the coercion attempted by the Court of Session as above set forth; and, that, at the risk and hazard of suffering the loss of the secular benefits conferred by the State, and the public advantages of an Establishment, they must, as by God's grace they will, refuse so to do : for, highly as they estimate these, they cannot put them in competition

with the inalienable liberties of a Church of Christ, which, alike by their duty and allegiance to their Head and King, and by their ordination vows, they are bound to maintain, "notwithstanding of whatsoever trouble or persecution may arise."

And they protest, that all and whatsoever Acts of the Parliament of Great Britain, passed without the consent of this Church and nation, in alteration of or derogation to the aforesaid government, discipline, right, and privileges of this Church (which were not allowed to be treated of by the Commissioners for settling the terms of the union between the two kingdoms, but were secured by antecedent stipulation, provided to be inserted, and inserted in the Treaty of Union, as an unalterable and fundamental condition thereof, and so reserved from the cognisance and power of the federal Legislature created by the said Treaty), as also, all and whatsoever sentences of Courts in contravention of the same government, discipline, right, and privileges, are, and shall be, in themselves void and null, and of no legal force or effect; and that, while they will accord full submission to all such acts and sentences, in so far —though in so far only,—as these may regard civil rights and privileges, whatever may be their opinion of the justice or legality of the same, their said submission shall not be deemed an acquiescence therein, but that it shall be free to the members of this Church, or their successors, at any time hereafter, when there shall be a prospect of obtaining justice, to claim the restitution of all such civil rights and privileges, and temporal benefits and endowments, as for the present they may be compelled to yield up, in order to preserve to their office-bearers the free exercise of their spiritual government and discipline, and to their people the liberties, of which respectively it has been attempted, so contrary to law and justice, to deprive them. 22.

And, finally, the General Assembly call the Christian people 23.

of this kingdom, and all the Churches of the Reformation throughout the world, who hold the great doctrine of the sole Headship of the Lord Jesus over his Church, to witness, that it is for their adherence to that doctrine, as set forth in their Confession of Faith, and ratified by the laws of this kingdom, and for the maintenance by them of the jurisdiction of the office-bearers, and the freedom and privileges of the members of the Church from that doctrine flowing, that this Church is subjected to hardship, and that the rights so sacredly pledged and secured to her are put in peril; and they especially invite all the office-bearers and members of this Church, who are willing to suffer for their allegiance to their adorable King and Head, to stand by the Church, and by each other, in defence of the doctrine aforesaid, and of the liberties and privileges, whether of office-bearers or people, which rest upon it; and to unite in supplication to Almighty God, that he would be pleased to turn the hearts of the rulers of this kingdom, to keep unbroken the faith pledged to this Church, in former days, by statutes and solemn treaty, and the obligations, come under to God himself, to preserve and maintain the government and discipline of this Church in accordance with his Word; or otherwise, that he would give strength to this Church—office-bearers and people—to endure resignedly the loss of the temporal benefits of an Establishment, and the personal sufferings and sacrifices to which they may be called, and would also inspire them with zeal and energy to promote the advancement of his Son's kingdom, in whatever condition it may be his will to place them; and that, in his own good time, he would restore to them these benefits, the fruits of the struggles and sufferings of their fathers in times past in the same cause; and, thereafter, give them grace to employ them more effectually than hitherto they have done for the manifestation of his glory.

II. Historical Mistakes of Mr. Macgeorge.

The fact that Mr. Macgeorge has avowed himself to be the author of his publications respecting the Free Church, and has given his name in connection with a collected edition of them, makes it reasonable to take particular notice of them. In common with most people that I know, who are competent to judge, I hold a view about anonymous publications from which he seems to differ. I consider that, on the one hand, no person whose name is before the public can be reasonably expected to reply to anonymous imputations; and that, on the other, any such person may most reasonably make any public use which suits his purpose or his argument of what an anonymous writer has said, without the fact of his going no farther in its treatment being justly regarded as furnishing the slightest evidence of his not being prepared to reply to representations, the authorship of which is concealed. Upon this principle, the declinature of Dr. Candlish or Dr. Buchanan to respond to the challenge of "Veritas" proves nothing. Upon the same principle, though referring to misstatements by way of illustration, in the Free Assembly of 1875, I did not think myself called upon to answer his arguments, when afterwards urged in an anonymous letter. But knowing that I have now to deal with a gentleman of respectable position, in communion with the Established Church, I proceed to exhibit an amount of mistake on his part which may seem almost incredible to those, on whom the confidence of his tone has made an impression.

1. He has asserted that the Free Church party, in passing the Veto Law and the Chapel Act, aimed at *alterations* in the *constitution* of the Church; whereas, the slightest acquaintance with the original discussions regarding these Acts is enough to

prove that they contended for them as necessary, in order to carry out rightly the *existing constitution.*

2. He asserts, in his preface, that the Free Church party could not fail to see the effect of the decision of the Civil Court as preventing vested rights from being taken away by an Ecclesiastical Court, and that they consequently *appealed* to the State to recognise and secure their *spiritual independence;* whereas, the facts stated in my introductory chapters prove, that they applied to the State in the first instance only for a practical measure which, by satisfying them upon the Non-intrusion question, might supersede the necessity of any legislation about spiritual independence.[1]

3. He asserts that the Free Church party claimed Parliamentary legislation, by which "the civil right must yield when it clashes with ecclesiastical legislation;" whereas, the very nature of their applications and negotiations from 1839 till May, 1842, implied the very contrary, and proceeded on the admission that civil rights must not only be fixed by Parliament, but enforced by the Civil Courts, while, as yet, no request had been put forth for a formal ratification of spiritual independence.

4. He commits an utterly inexcusable blunder when he speaks, both in his preface and elsewhere, of its being "the mistake," and even "*the grand mistake,*" of the Free Church party in leaving the Establishment, that they thereby expected to escape from the jurisdiction of the Civil Courts, or even to avoid an interference with their spiritual independence from that quarter. He speaks of their being "awakened from a fancied security" by the Cardross case, in 1859. Let him study the statements I have quoted in Part I. chap. IV. sect. 2, and he will see how entirely his representation is con-

[1] See Chapter II., Part I.

trary to *fact.* Let him explain, if he can, how his manifest ignorance of essential fact in this instance can be reconciled with the boldness of his assertions in other instances. The expectations of the Free Church leaders were precisely the reverse of what he imputes to them. Of course, when they were called to plead in the Civil Court, they thought it right to test as well as they could by their pleas, how far the Civil Court would go in applying the same Erastian principles which had caused the disruption to the position of a disestablished Church. But their endeavours in this direction, being clear matter of duty, prove nothing as to their previous expectations, and cannot prevent the evidence I have given from convicting Mr. Macgeorge of reckless error.[1]

5. He represents the Free Church as having been restrained and tied down by the judgment of the Court of Session, and compelled to obey its ruling; whereas, I have shown that she never was restrained or tied down by it in any part of her ecclesiastical procedure, or obliged to obey it in any ecclesiastical action, but was left thoroughly free to follow her own course. Mr. Macgeorge may infer that she would be tied down or restrained by it in certain circumstances. But this is only his inference, and has never been realised in *fact,* either in that or in any other case.

6. His account of the action of the Court of Session in the Cardross case is so seriously inaccurate as to destroy all the value of his reasoning. When he wrote his pamphlet, entitled "Spiritual Independence," he seems to have discovered what had eluded his observation before, that the original actions were dismissed by the Court before Mr. Macmillan's funds

[1] He will see further proof of his error if he will look at Dr. Buchanan's speech on the Cardross Case, as quoted in his newly published biography, pp. 377, 378.

failed him. Still he makes two fundamental mistakes, and two others of less importance—in all, four. He first of all represents the dismissal of the actions as proceeding only on certain *technical* objections. Now, supposing it to be admitted (which I do not admit, but do not here take the trouble to controvert) that the impossibility of finding the General Assembly, as a collective body, the proper party for an action with respect to civil rights or damages, is a mere *technical* objection, it is evident that the inference founded on it is not merely *technical*, but goes into the very pith and marrow of the Free Church plea, when rightly understood. For that inference was, that an action for reducing the Assembly's sentence, though it be against the proper party, could not be entertained apart from the question of civil rights or damages, with allegation of malice. The previous incidental decisions on preliminary questions, however much they might seem to touch Free Church principle, and however dangerous in their own nature as precedents, are of secondary consequence when placed alongside of the previous *obiter dicta* of the judges—that they entertained the conclusion for *reducing*, only in the view of removing the sentences out of the way in the question of civil right or damages. The real decision in the Cardross case was the dismissal of the actions on the fundamental principle which I have now pointed out. It shows that the conclusions founded upon the case by Mr. Macgeorge and others have no adequate basis.

The second fundamental mistake lies in the supposition that Mr. Macmillan's new action, with an amended summons, was directed against the Free Church as such. It was an action of damages against particular members of the Free Church, with an allegation of malice. There was in it a conclusion for reduction of the sentences. But the alternative was added, "To the extent to which they may interfere with civil restitu-

tion or damages." Free Church principle could not insist on resistance to an action aimed only at individual men, with an allegation of malice. There were matters in the summons, against which the persons immediately concerned thought that they had good pleas on Free Church ground. Still, the fundamentals of Free Church principle were not so involved in the action as to have prevented the parties from adjusting issues for a jury, after the previous avowal by the Court that they would not entertain an action for reducing or reponing, when separated from a question of civil rights or damages. This view of the case is entirely overlooked by Mr. Macgeorge. The retirement from want of funds applied exclusively to a matter in which nothing could have been decided against Free Church principle.[1]

A third mistake of Mr. Macgeorge lies in speaking of what he calls the *technical* objections in the original case, as if they had been raised by the Free Church. In *fact*, they were raised by the Court at its own instance. Of their own accord they found that an action for reducing the sentences was not competent, apart from a question of civil rights or damages.

The fourth mistake lies in his overlooking the circumstances that, if the original actions had not been dismissed, the Free Church, in place of going to a jury, would have appealed against all the previous decisions, as well as the final one, to the House of Lords, and that the final decision in her favour prevented such appeal, so that the previous decisions cannot be looked upon as decisive precedents.

7. He speaks as if the decision in the Cardross case had so surprised the Free Church as to have prevented her speaking of spiritual independence for some time. The very contrary was the case. Whatever Mr. Macgeorge or other lawyers might think, the Free Church continued to believe that she had gained

[1] See Special Appendix on Cardross Case.

a decisive victory in that case, until some doubts were thrown upon the effect of it by statements in the work of Mr. Taylor Innes. No such doubts had the least influence in altering her convictions as to the foundation of her principles; nor did she, at any time, represent her freedom from Patronage as the chief ground of her position.

8. He asserts that the bulk of Free Church ministers and people, the English Presbyterians, and our missionaries in India, did not understand the real facts at the time of the Disruption, but were misled by extraordinary means. The means were simply the clear and convincing statements of such men as Dr. Chalmers, Dr. Gordon, Dr. Cunningham, Dr. Guthrie, Dr. Candlish, Dr. Buchanan, Mr. Murray Dunlop, Mr. John Hamilton, Mr. Graham Spears, Mr. Earle Monteith, and the late Lord Ardmillan, backed by the enlightened knowledge and strong sagacity of our ministers, elders, and people in large numbers, both in town and country, along with the declarations and expositions of the minority in the Court of Session, and the popular enforcement and vivid elucidations of Hugh Miller and other writers. It is a great mistake to suppose that, when the Claim of Right was drawn up, any detailed explanation of its particulars was required to satisfy the public or the Church. Let any one search the newspapers during the years 1838, 1839, 1840, 1841, and 1842, and he will see that the opposite interpretations of law in the Court of Session, and the effect of these upon the resolutions of the Assembly, were thoroughly comprehended throughout the community, and that many people, having taken their sides, were ready in 1842 to welcome a systematic digest of the ground contended for by the Church—a digest which could not, in the nature of things, be constructed on the principle of setting forth explanations which were already in their substance

familiar to the general mind. It is only because *facts* are forgotten, or lost sight of, that the writings of Mr. Macgeorge have induced some of his readers to acquiesce in his conclusions.

The formation of opinion in India on the subject was very different from what he imagines. It was no mere enthusiastic and unauthenticated statement about the contents of the Claim of Right that affected the minds of our missionaries. Instructed by good information regarding the whole progress of the controversy, both in the Civil Courts and in the Church Courts, as well as in the public press, they judged for themselves, and were intelligently earnest in the cause of the Free Church. It is true that the general mind of Presbyterians in our settlements was in a state of considerable ignorance till the news of the Disruption reached Calcutta in July, 1843. The only representations hitherto before them were adverse to the Free Church party. How was their ignorance dealt with? Was it by exciting and superficial utterances? No. The matter was dealt with in a different spirit.

Dr. Duff set the example. Let Mr. Macgeorge study his course of lectures, delivered to very large audiences in Calcutta during the latter part of 1843, afterwards published there in a periodical called "The Free Churchman," and finally given anew to the public in a collected shape in 1844. Let him study these lectures attentively, and he will find that, in a popular and telling manner, Dr. Duff instructed his audiences in all the particulars that form the substance of the Claim of Right. He dealt with the whole subject far more minutely and thoroughly than Mr. Macgeorge has done. After an exact examination of the scriptural principles, the history, and the legal bearings of the matter, he said, with relation to the opinions of the minority of the Court of Session, that they "piled up fact upon fact, precedent on precedent, argument on

argument, demonstration on demonstration—enough, and more than enough, to satisfy an hundred times over any judgment which was not preoccupied and preclosed that the contrary interpretation was not only more stringent than had ever been suggested or imagined before—not only a perfect novelty in Scottish jurisprudence, but also in direct contradiction to the express provisions of many other clear, explicit, and unambiguous statutes." [1]

In a note annexed to this part of his lectures, he reprinted the statement of a person who heard the judicial opinions delivered on the Auchterarder case, the opening passage of which is as follows :—" It is a curious fact that Lord Glenlee, the oldest judge on the Bench by nine years, and, it is said, the oldest in Britain—having been forty-three years on the Bench, and eighty-three years of age—was the only judge who did not read his speech; and it is still more remarkable that, short as it was—for he did not speak more than twenty minutes—no opinion has *damaged so much the legal authority of the judgment.* He meddled with nothing but the legal question." I add these quotations from the same writer: " The uncommon independence of mind and intellectual acumen of Lord Glenlee, unimpaired by years, render his opinion invaluable to the Church as a legal authority. He had certainly no bias in favour of the Veto Act." His " opinion was altogether unexpected. It had been taken for granted that he concurred with the majority; and the impression, when he declared that the question was wholly within the ecclesiastical jurisdiction, appeared very manifest in the change of some of the most expressive countenances." These quotations are of two-fold value; for they are a specimen both

[1] The Sole and Supreme Headship of the Lord Jesus, &c.; or, A Voice from the Ganges. By Dr. Duff. Published by Rushton, Calcutta. 1844.

of Dr. Duff's careful survey, in his lectures, of all that had occurred, and of the impression conveyed to multitudes in Scotland even so early as 1838. The reliability of the statements made in them is all the greater because the writer shows a spirit of impartial appreciation. He describes the speech of Lord Corehouse against the Church as "a beautiful oration," which possessed great merit in respect of the order and ingenuity of the reasoning," its "various stores of learning," "the classic eloquence of the language, and the style and manner of the delivery." Mr. Macgeorge takes for granted the accuracy and validity of the views expressed by the Dean of Faculty Hope and the majority of the Court. His accuracy in his alleged *facts* depends very much upon the correctness of those views. If they be well founded, then some of his *facts* will stand. If the reverse, then, as I shall afterwards show, they are not really *facts* at all.

9. Mr. Macgeorge says that, in the question of union with the United Presbyterians, we could not get over Dr. Begg's reference to the Protest and Claim of Right. There is not a vestige of reality in this averment. We believed that any such reference was thoroughly answered, and the proposed union did not compromise our attachment to the Establishment principle. The real history of the matter is what I have stated in Part I. chap. II. sect. 3.

10. Mr. Macgeorge asserts with unhesitating confidence that, when Dr. Begg *threatened* that he and those who agreed with him would declare themselves to be the Free Church, and claim the whole of the temporalities, the proposed union was abandoned. I do not think that Dr. Begg will thank him for assuming that he uttered such a threat, so as to justify our indignant remonstrance when the very idea of it was suggested. *The facts*, however, are quite different. The appearance of the

threat, by whomsoever manifested, tended rather to make us persevere in the attempt to accomplish the union. But when we found the extent to which the minds of a portion of our Church had been biassed against it in point of principle, we felt it an obligation of Christian duty, even in the interest of union, to yield to their opposition. I have already given the true history. Mr. Macgeorge not only assumes his alleged *facts* in a reckless manner, but he shows a misunderstanding on questions of ecclesiastical principle which goes a great way to incapacitate him for judging of Free Church procedure. He says that we *once* held the union to be matter of binding principle, but *now* regard it as only matter of *expediency.* He does not see that the *binding principle* might oblige us to prosecute the *union,* and might make it the duty of the Church to carry it out, if, with anything like a general concurrence of sentiment, she saw the subject in the light of our arguments; and yet that the very nature of the principle itself must prevent us from causing a great disruption through the breaking up of our existing union.

11. Mr. Macgeorge maintains that our plea as to what we did in resistance to the Court of Session being purely spiritual and not aiming at affecting civil rights, was the poorest of quibbles. But it was a plea founded on that view of the law and the legal practice which the minority in the Court of Session had upheld; and, whether it be a good plea or a bad plea, it will continue to be respected by impartial inquirers, though Mr. Macgeorge should call it a quibble to the end of his days. He quotes the authority of Lord Brougham to support his allegation. I have no hesitation in saying, in concurrence with a general opinion in 1839, that Lord Brougham was as reckless in his assertions as Mr. Macgeorge—an opinion, the truth of which was thoroughly brought out by Hugh

Miller in his celebrated letter. At the same time, Mr. Macgeorge does not perceive that, in point of *fact*, the observations of Lord Brougham do not apply to the same point with his own. His lordship spoke only of the view which held the Veto Law to be legal out and out, even to civil effects, and as not thereby invading the right of the patron—the view held by the minority of the Court. Mr. Macgeorge applies the observation to the argument which maintains that, even though illegal, the opinion of the Court must not be carried out by coercive measures as to ecclesiastical action; but that their power must be confined to the disposal of temporalities; with which the Church did not meddle.

12. Mr. Macgeorge says that, though we had *ascertained* by a judicial sentence that we had not the power of changing the composition of Presbyteries, we did not take the *honest* course of at once abandoning the Church, but proceeded "to rail at the State, to rail at the Court, to accuse it of encroachment, of oppression, of acting in opposition to God's Word, and of violating the constitution of the country." He asks what right we had to do this. In short, he represents us as *dishonestly* taking a course opposed to what we knew to be the truth. But, whatever he may think of the justice of the argument, has he no respect to the *fact* that, in common with able and accomplished judges, we *honestly* believed that the Court of Session had no jurisdiction to pronounce the judgment which they did pronounce in the Stewarton case, and that we were not called upon to yield to it until we became satisfied that, upon a representation to the Legislature, no relief would be afforded to us from the principle involved in it? Has he no respect to the *fact* of our firm conviction that it came into conflict with our obligation to the Great Head of the Church, and to the *fact* of our persuasion that these obligations were

protected by old constitutional bulwarks which it illegally traversed? Has he no respect to our conception that the terms of the Treaty of Union with England precluded even the British Parliament from sanctioning the application of it? He may consider all these ideas as utterly erroneous. But a reasonable regard to *facts* should have restrained his intolerant language.[1]

13. He speaks of the Claim of Right and Protest as what might be charitably supposed to be a hastily drawn document, framed by Mr. Murray Dunlop at a time of excitement; and he designates it as an *unscrupulous* partisan paper. Is he ignorant of two essential facts which contradict this representation? Does he not know that Mr. Dunlop was one of the most conscientious and unselfish of men, and that Lord Cockburn has recorded his testimony to the *fact* of this being his character? And does he not know the *fact* that the Claim of Right and Protest received the high approbation of parties referred to in Part I. chap. II. sect. 1, whose opinions it is impossible for him to treat in a contemptuous manner?

14. When asserting that in none of the instances of alleged encroachment did the Court of Session do more than interpret the law and the statutes, he describes this *as a function which*

[1] Mr. Macgeorge dwells rather thoughtlessly upon the fact that, in the Stewarton case, the pleas of the Presbytery were founded only on law and statute. He does not see that *all* our pleading in *every* case was so founded. We did not expect a Civil Court to give effect to pleas about scriptural principle which were not sanctioned by law and statute. On the other hand, the argument of Lord Moncreiff and others was, that the comprehensive words of the statutes embraced much that was not specified in statute. This argument has been strangely misapprehended by Mr. Macgeorge (as it was by judges in the majority), as if it rested the case upon something beyond law and statute. The Presbytery of Irvine never admitted that they were to be confined to the specific provisions of statutes.

it will not be pretended belonged in any way to the Church Courts. He thereby displays his ignorance of what was the very turning point on the question of jurisdiction, both in the Court of Session and in the General Assembly. The thing which he thinks will not be *pretended* was *the very thing* claimed for the Church Courts in the arguments for co-ordinate jurisdiction which I have set forth in Part II. chap. III. Reasoning on the foundation of this error, he could not fail to go wrong in every particular of his criticism on the Claim of Right.

III. Mistakes of Mr. Macgeorge regarding the Old Foundations.

He agrees with the Dean of Faculty Hope in interpreting the statement in the Westminster Confession about "government distinct from the civil magistrate," as not covering those subjects upon which the controversy turned. We do not quote that statement for the purpose of showing what are the matters that belong to the distinct government, but only in support of the principle that, with respect to all matters that really do belong to that government, the ecclesiastical jurisdiction must be absolutely co-ordinate and independent. Throughout his writings, Mr. Macgeorge keeps very much out of view the certain *fact* that, whether rightly or wrongly, what he calls the Free Church party were always influenced by the conviction that, according to the Divine Word, the subjects in controversy did belong to the class included under the distinct government, and with respect to which it was necessary to stand out for an absolutely co-ordinate jurisdiction. In one of his pamphlets he actually says that the question is not one of doctrine. He might

surely have remembered and noted that, though not one of doctrine to him, it is one of doctrine to us.

He dwells on quotations from Rutherford and Gillespie. In addition to what I have said in Part I., let me add here two enforcements of my view.

First, let me quote for him the 84th and 85th of Gillespie's Propositions. The 84th is—"If any man should again object that the magistrate is not indeed to resist ecclesiastical government, *yet that the abuses thereof are to be corrected and taken away by him;* the answer is ready; in the worst and troublesome times, or in the decayed and troubled estate of things, when the ordinance of God in the Church is violently turned into tyranny, to the treading down of true religion, and to the oppressing of the professors thereof, and when *nothing almost is sound or whole*, divers things are yielded to be lawful to godly magistrates, which are not ordinarily lawful for them, that so to extraordinary diseases extraordinary remedies may be applied. So also the magistrate abusing his power unto tyranny, 'tis lawful to resist him by some extraordinary ways and means which are not ordinarily to be allowed." Thus the occasion for the civil power exercising power over ecclesiastical action is put on a level with the occasion for resisting the civil power itself. The 85th Proposition is—"Yet ordinarily, and by common or known law and right in settled Churches, if any man have recourse to the magistrate to *complain* that, through abuse of ecclesiastical discipline, *injury is done to him*, or if any sentence of the pastors and elders of the Church, whether concerning faith or discipline, do displease or seem unjust unto the magistrate himself, *it is not for that cause lawful to draw those ecclesiastical causes to a civil tribunal, or to bring in a kind of political or civil Popedom.*"

The quotations of Mr. Macgeorge are those made by Lord Medwyn in the course of his elaborate judicial opinions. But what I have extracted from the Propositions of Gillespie and Baillie is sufficient to make it clear that both Lord Medwyn and Mr. Macgeorge have mistaken the meaning of the ancient worthies to whose declarations they appeal. But let me, *secondly*, refer Mr. Macgeorge to a statement of Lord Fullerton in answer to Lord Medwyn.

Speaking on the subject of the Strathbogie deposition and its proposed reduction, he said that he thought all Lord Medwyn's quotations from Gillespie and Rutherford pointed at the separate question, whether the secular authority, when called to aid the spiritual, was entitled to exercise any discretion of its own. He thought they were intended to refer simply to relations of the State itself to the Church, and not to any relation between Civil Courts and Ecclesiastical Courts. He remarked further, that, whatever view might be taken of the particular testimonies appealed to, *he would undertake to produce twice as many from the same parties the other way.*

IV. Mistakes of Mr. Macgeorge regarding Essential Distinctions.

1. He refuses to allow the distinction which both the Church and the minority of the Court made between a civil right which is independent of ecclesiastical action and a civil right, the full benefit of which has been specially annexed to ecclesiastical action. A patron's right of presentation must be recognised by a Presbytery before taking any ecclesiastical action with respect to the vacancy, if they desire that such action shall entitle a pastor to the stipend. If this line of

action shall turn out to be illegal, the stipend will not follow it. But the constitutional doctrine of the Church and the minority was that the Church Courts were not bound to be the instruments of the civil law in conferring civil rights, however desirable it was that the civil right and the ecclesiastical action should harmonise. Upon this principle, it was perfectly consistent and legitimate for the Church Courts to disclaim all pretence of right to settle civil questions, while disregarding the question, how far their conscientious ecclesiastical action might, in the view of a Civil Court, affect the possession of civil benefits. It was admitted by the judges, in recent cases quoted by Mr. Macgeorge, that, though civil benefits are affected by unjust deposition, that circumstance would not justify the interference of the Civil Court. We only contend for the application of the same principle to the kind of cases with which the Court had to deal before the Disruption. On the other hand, the distinction, not perceived by Mr. Macgeorge, obliged the Church, when dealing with what she felt to be a spiritual matter belonging to her distinct government, to act with regard to it upon her own scriptural principles, and not to be diverted from so doing by the fact of some question affecting civil rights being possibly contingent upon it or more or less affected by it. This distinction was recognised by the minority of the Court as one essential for the protection of the Presbyterian Church, when consistently acting according to its own conscientious views of scriptural obligation.

2. Mr. Macgeorge does not see that the Free Church never contended that an Ecclesiastical Court could take away vested rights. He refuses to look at the distinction between a simple enforcement of these rights, by conferring or withholding temporal benefits, and the exercise of coercive power over the Church Courts.

3. In speaking of the Bill for the Abolition of Patronage, with reference to statements by Dr. Candlish and Dr. Buchanan, and their former support of the Duke of Argyll's Bill, he does not see the difference between a measure for the support of Non-intrusion, *while the spiritual independence was not yet thought to be overthrown*, and even a measure going much farther, which must, of necessity, be interpreted according to *the principle of those decisions in* 1843 *regarding the jurisdiction question*, of which he approves, but which were sufficient to cause the Disruption. Dr. Candlish and Dr. Buchanan believed that the abolition of Patronage, without a distinct cancelling of the principle of those decisions, would only multiply the probabilities of Erastian encroachment by multiplying the parties interested in the civil rights involved. This explanation applies also to what he has stated on the subject of the Act 1690. Rightly or wrongly, we believed that, under the Revolution Settlement, spiritual independence, as understood by us, was secured. Even in 1842 (and still less in 1841) we had not given up the idea that our spiritual independence might be recognised if an adjustment were made of the practical question.

4. The mistake made by Mr. Macgeorge in supposing for a moment that the word "*temporalities*," ascribed to Dr. Candlish in the newspaper report of 10th June, 1870, could possibly be correct, was greatly aggravated by his reply to Dr. Candlish, in which he treated the matter as if it involved a mere question between the accuracy of the report and the personal consistency of any one. There was thereby exhibited in the strongest manner the very want of perception which characterises his writings on the subject of the Free Church position. A person thoroughly conversant with the fundamentals of our contention, whatever his own opinions might have been, would have seen

at once that the word "temporalities" must be a mistake, or, if he had overlooked it, would have apologised for the oversight. For he would have known that the very essence of Free Church principle, as maintained all along by all our faithful leaders, lay in a careful distinction between the maintenance of our exclusive spiritual jurisdiction and any want of readiness to lay all "temporalities" at the feet of the Civil Court. Without a constant eye to this distinction, there would have been no Claim of Right and no Disruption.

5. It is the absence of the same clear view as to the distinctions I have spoken of that leads Mr. Macgeorge to agree with Lord Brougham in calling a plea founded upon it "a paltry subterfuge," just as a similar absence deceived Lord Brougham himself.

6. With respect to the mode in which the Disruption was carried out, Mr. Macgeorge seems not to have breadth of view enough to distinguish between the formal steps which ordinary circumstances admit of, and the course which, in extraordinary emergencies, may do more in substance for what these steps might aim at than could be accomplished by an exact following of them. The exodus in 1843 was not an exodus from a Church, but only from a civil connection. Not one man of those who joined in that exodus on the 18th of May surrendered his spiritual function or fellowship in the Church of Scotland. And, in the circumstances, the exodus may fairly be counted the substance of a separation from the State of the true Church of Scotland, representing the Church of the Claim of Right—the Church of the Revolution—the Church of our fathers.

7. Mr. Macgeorge ascribes confusion of thought to Dr. Candlish in that passage from his remarks on the Dean of Faculty's letter which I have quoted in Part I. chap. II. In reality, the confusion of thought is all his own. Dr. Candlish had gone up into a higher region of thought than Mr. Mac-

george aspires to. The latter assuming his own favourite conception about there being a compact between Church and State, the terms of which must be interpreted by the Civil Court—a conception quite opposed to the ideas of the majority in the Court of Session, and to those also of the judges in the House of Lords—has tried the representation of Dr. Candlish by his own small imagination, that the Civil Court are the sole judges of all contracts and compacts. He looks to the question of parties in the Church, or of the Church as a party against Lord Kinnoul and his presentee. He turns away from the large question as to the constitutional co-ordination of authority between the Church and the Court of Session, and as to the certainty that there was now a conflict between those powers with relation to the claim of co-ordination and equality. Manifestly, that conflict, if carried on, would lead, either to interference by the State, or, at least, to a call being made upon the State to interfere. Thus Dr. Candlish was passing away from the particulars of special cases up to the more commanding question, how terms of agreement were to be maintained between the State and the Church. He did not mean that, as yet, the question was between the State and the Church. He expressly said the contrary. But the Dean of Faculty had maintained the decision of the Civil Court to be equivalent to a decision by the State. In denying that view, Dr. Candlish had occasion to point out that the question, if much longer agitated, must become a question with the State, and not merely with the Civil Court or with any other party. It is said, indeed, that the Legislature did nothing at the time of the Disruption. But when the Church appealed to the Legislature to deliver her from the unconstitutional oppression of the Civil Court, and, in doing so, was supported by a majority of the members of Parliament for Scotland, and when the Legislature refused

to interfere, the refusal was equivalent to a sanction of the judicial decisions, and made the Legislature responsible for them as the law of the State.

If the jurisdiction of the Church Courts was not, by the constitution, thoroughly co-ordinate with that of the Civil Courts in the sense maintained by Lord Fullerton and other judges agreeing with him, then Mr. Macgeorge is right in saying that the *facts* are against our Claim. But if there was such a co-ordinate jurisdiction by the constitution, then his *facts* are *no facts* at all.

8. Mr. Macgeorge evidently does not understand what Erastianism means, nor the true character of the religious principle opposed to it. Many judges and statesmen have shared this misunderstanding with him. He says that Erastianism is, where the civil power claims the *right to do spiritual acts;* but that there is nothing Erastian in the magistrate *compelling* Church-officers to *do their spiritual duty.* He does not see that a mere abstinence from *claiming a right to do spiritual acts* does not touch the essence of the question between Erastians and their opponents. It is a question as to the *power* of regulating spiritual things.

9. He says that our view is, that an "oppressed man" shall have no relief. But he forgets our distinction by which such a man may have relief as to all temporalities, though not by means of coercive power applied to the Church.

V. Mistakes of Mr. Macgeorge regarding the Value of Judicial Opinions.

It does astonish me extremely to find a man of ordinary intelligence assuming that we cannot claim the authority of judges for our position, because, after the final overruling of their opinions in the House of Lords, or by a majority in

unappealed cases, they, as members of the Bench, assumed the law as settled against their own judgment, and made the best of the settlement in subsequent opinions. Their doing so does not prove that they had changed their views. It was their duty to administer the law as it had been authoritatively declared. I know of only one case in which any change of view was indicated, and that was not in a direction to satisfy Mr. Macgeorge. He has incautiously quoted Lord Cockburn's opinion in the Lethendy case, not observing that his lordship had, when speaking in the Stewarton case, declared that subsequent reflection had made him doubt the correctness of his judgment in the Lethendy one. In consequence of an erroneous report of Lord Jeffrey's observations on the Stewarton case, an imagination was spread that he had declared an alteration of opinion on the Auchterarder one. But I have reason to know that Lord Jeffrey disclaimed entirely any such retractation, and said that it was open to any person to contradict the idea of it, because there was nothing of the kind in the authorised report which he had revised himself.

My astonishment is still greater when I find Mr. Macgeorge attaching importance to the *fact* of the judges in the minority not doing anything to encourage the resistance made by the Church to the decisions. Of course, whatever they may have thought privately, they could not have done so publicly without divesting themselves of the character due to their judicial function; but as long as any point of the contention might be, in any view, considered open, the expression of their sentiments was fitted to justify the Church. The only thing further which any one of them could have done, was the attaching himself to the Free Protesting Church of Scotland. He was not called upon to do this as matter of consistency, unless he not only regarded the Free Church view as protected by the constitution,

but had embraced it himself as matter of ecclesiastical choice. I do not know, with respect to most of these judges, what their Church connection personally was. I know of one who was an elder of the Established Church, but who, soon after the Disruption, resigned his eldership, attached himself to the Free Church of Scotland as the true Church of his fathers, and continued as a firm member and supporter of it, both in town and country, till his death. He did so quietly, indeed, and unobtrusively. But, as a judge having had to do with the controversy, he could hardly have given any stronger testimony to the value of Free Church principle.

VI. Mistakes of Mr. Macgeorge with regard to Cases in the Last Century.

I have treated this part of the subject so fully that I have hardly anything more to do than to ask Mr. Macgeorge, and my readers generally, to look well at the particulars. Let me ask him and them to observe that our judgment of the representation given of them in the Claim of Right ought to turn very much on the estimate we form of the arguments regarding the interpretation of the Acts of Parliament. The decisions, indeed, in some particulars, may help towards the interpretation. Still, those judges who saw clearly that the legislation was in favour of the Church were led to contemplate the cases in the light of the question, whether they seemed to have been dealt with in harmony with that interpretation. Mr. Macgeorge, assuming the conceptions of the Lord President and the Lord Chancellor, may naturally draw the inference that the Court in the last century would have acted on these conceptions, because they had sustained their jurisdiction to certain effects. But this

is only matter of inference, and cannot stand before the supposition that the judges fully recognised the distinctions for which we contend. The admissions of the Lord President and Lord Cunningham are quite sufficient to bear out our representation.

With reference to the case of Unst, Mr. Macgeorge will find that he is entirely in the wrong, that the report in Morrieson's Dictionary supports what I have maintained regarding it, and that the conclusion about "decerning and ordaining" was clearly a *petitory* and not a *declaratory* conclusion, and was certainly not included in the judgment. He may depend upon it that Mr. Dunlop, in framing the Claim of Right, had studied the particulars far more thoroughly than he has done, and gave a brief statement of the case, with a most exact regard to truth. The Dean of Faculty could not maintain that the conclusion referred to was capable of being acted on. I think the fact must have escaped his notice, that it was dropped out of the case because it was not *declaratory*.[1]

VII. Mistakes regarding Scottish Legislation.

I advert to the question of such mistakes, simply because they necessitate assertions with respect *to fact*, which could not be made if it were not for these mistakes. A man who believes that the law and constitution allowed the Court of Session to interfere as they did, will, of course, deny that they interfered with lawful action by the Church. He holds it to have been unlawful, because the Court of Session found it so. We say that they had no jurisdiction to find our ecclesiastical action unlawful, in the sense of giving them right to coerce us. If our view of the law and constitution be correct, then our

[1] See Part II. chap. III. sect. 4.

action was lawful in all the instances referred to, so far, at least, as ecclesiastical effects were concerned. Consequently, on the same supposition, any civil interference was encroachment on our jurisdiction, and an overthrow of the constitution. The question, therefore, how far the law and the constitution were rightly or wrongly interpreted, is a material one for the defence or condemnation of our Claim, and the view any one takes of that subject must colour his contemplation of *facts.* Thus, most of the serious questions raised by Mr. Macgeorge are not really questions of *fact* at all, but questions of scriptural principle and legal interpretation. His mistakes on this point are mistakes which, in the Free Church view, he shares with the Court of Session, the House of Lords, and the Legislature. He is fully welcome to all the weight which this circumstance may give to his opinions, provided he will deal fairly with those who differ from him.

VIII. Mistakes of Mr. Macgeorge regarding the Encroachments of the Court of Session.

I have shown how the statement in the Claim regarding the cases of Lethendy and Stewarton may be defended. With reference to the Stewarton case, it is nothing to the purpose to say that the Court did not interdict the Presbytery from sanctioning *quoad sacra* charges without regular kirk-sessions, and without seats in the Presbytery for a minister and elder. The Church having found that, for the effective working of the Church towards its objects, and for the extension of the Church on right principle and in a useful manner, the institution of kirk-sessions and the admission of ministers and elders to the Presbyteries was of serious consequence, the interference

of the Court of Session was, as matter of *fact*, an interference with the Church in her efforts for Church Extension upon her own principles.

Mr. Macgeorge wonders why the *first* Auchterarder judgment is not founded on as an encroachment. If he had attended rightly to the *facts* of the history, he would have known quite well that we went on the theory, that it did not of necessity carry the consequences which the Court of Session drew from it, until the decision in the *second* case was pronounced on the appeal. In fact, that appeal was taken for the purpose of testing the meaning of the House of Lords.

The remarks of Mr. Macgeorge on the other cases mentioned in the Claim do not call for special notice, because they all proceed on the false assumption that the ecclesiastical acts of the Church involved in them were certainly unlawful and *ultra vires*, because the Court of Session or the House of Lords had declared them to be so. He assumes the very thing to be proved. Our declarations were based on the ground set forth by the judges in the minority, that our acts were all in the exercise of a jurisdiction given to us by the constitution—a jurisdiction to maintain which against the Court of Session we were bound by our ordination vows, and the thorough independence of which could not be invaded without a violation of the constitution. The statement of Mr. Macgeorge, that we aimed at depriving the Strathbogie ministers of their stipends and glebes, is entirely inconsistent with *fact*. We knew perfectly well at the time that we could not do that; and we meant what we said when we pled that our procedure was wholly spiritual. Mr. Macgeorge's *facts* are *facts* only in the light of his own view of law and principle.

IX. Mistakes of Mr. Macgeorge as to the Character of the Free Church Claim.

Mr. Macgeorge goes along with those who assert that the logical inference from what we require in the connection of Church and State is Popish supremacy. I have already shown how altogether contrary to logic this conception is. No view of the subject can more entirely shut out Popish pretensions than our view does. We deny the supremacy of *any* party. The ordinary notion of statesmen implies that there must be an absolute supremacy in *some* party. They think it must lie with the State or its Courts. But once admit the need for an absolute supremacy in *some* party, and the scriptural principle as to the impossibility of the Church yielding her own judgment in ecclesiastical matters, will inevitably land you some day in the conclusion that the supremacy must be in the Church.

Mr. Macgeorge quotes Dr. Willis to show that there cannot be a *via media* between Popish supremacy and the supremacy of the State. I have much respect for Dr. Willis; but I do not believe that many Free Churchmen agreed with him formerly, or agree with him now. I think I have already shown sufficient reasons why a *via media* must be found to satisfy conscience. But I think, also, that I have also shown that it was actually provided in Scottish law. The *gentler* method for maintaining the rights of Patronage with which the advisers of the Crown were contented, in the middle of the last century, was extremely well fitted, in the view of Lord Kames, to accomplish its object. The existence of the law, in the form that was then recognised, had an effect both upon patrons and people. We find numerous cases in which the patrons did not press their rights when they found that the

Presbyteries would have difficulty in proceeding to induction. We find cases, such as the one at Unst, in which, when a person inducted could not get the stipend, he yielded and left the field open to the patron and the presentee. That case of Unst was one specially adapted for illustrating the smooth working of the system as then understood. For the Presbytery had evidently treated the patron unreasonably, and there is no reason for supposing that his presentee was specially unacceptable. The rule about the fruits of the benefice was evidently fitted to put a wholesome check upon extravagant action by any party. But Mr. Macgeorge endeavours to make out that it could not work without bringing things to a dead-lock, and landing the Church in confusion. He forgets his own statement about the case of Unst, which he does not see is fitted to refute his representation. He makes suppositions inconsistent with the true character of what is contended for. But the general answer to him is twofold. First, no one could ever expect the principle of separating the right to temporalities from the right to spiritual functions therewith associated, to operate in a satisfactory manner, if frequently put into operation. It can only be of use, first of all, by keeping parties in check, and by preventing collisions of jurisdiction until practical matters can be adjusted. It might be of use, secondly, when any public question arises respecting Church order and its effects, by allowing an adequate breathing time for the settlement of practical matters in a manner that may satisfy both Church and State. I repeat here what I have said elsewhere, that there will be more likelihood of such a settlement when both parties confer upon equal terms, than when coercion is used by a Civil Court against the Church.

The second part of my answer is, that there is, and can be no other way for meeting the conscientious convictions of a Church

which believes that, in all ecclesiastical action, she is bound to be guided exclusively by the voice of her Head and King, speaking through His Word and ordinances.

X. Mistakes of Mr. Macgeorge as to Patronage and the Veto Law.

Mr. Macgeorge would fain represent the question as to the legality of the Veto Law as if it were one about which lawyers and men of sense can now have no doubt. Does he think that no weight at all is due to the opinions of Lords Glenlee, Fullerton, Moncreiff, Jeffrey, or Cockburn? He could not have spoken in this manner in 1838 or 1839. Perhaps he may insinuate that some of them were biassed by associations. It is true that Lord Moncreiff moved the adoption of the Veto Law in the Assembly. But it is also true that he formed his opinion most carefully and impartially beforehand. His evidence before a Committee of the House of Commons in 1834 proves that he had done so. But I happen to know that, two years previously, when he had not begun to study the questions about to be agitated in their relation to existing circumstances, his impression of what would be right was in a different direction, and that it was only after a very diligent consideration of the subject in all its bearings that he made up his mind to the course which he thought should be followed. In opposition to his own original prepossessions, he came to the conclusion that the danger to the constitution of the Church by an application to the British Parliament for a change of the law was so serious that, not out of love for Patronage, but out of regard to preserving the safeguards of our Scottish Presbyterianism, it was better not to incur that risk, but to preserve Patronage

under the restraints which he thought the Church could competently put upon it. Thus he came afterwards, with perfect consistency, to say that the intention of the Veto Law was not to destroy Patronage, but to preserve it. His fear always was lest the Church should be destroyed through the overthrow of its old anti-Erastian constitution. The design of the Veto Law was not to innovate, but to preserve.

We have abundant proof now that the danger dreaded by Lord Moncreiff was not imaginary. Unhappily, the evil was brought upon the country through the adoption, as we thought, of novel ideas by our Scottish judges, which found ready acceptance with English lawyers and statesmen. If the judgment and experience of Lord Glenlee could have prevailed, the results for our Church and country would have been very different.

It is foreign to the purpose of this publication to enter at large upon the merits of the Veto Law, or upon the arguments in support of its legality to *all effects*. Lord Glenlee gave good reasons for holding that the word *qualified* included qualification for the particular charge, and exhibited very conspicuously how the existence of the principle of Non-intrusion in the constitution of the Church implied that the qualification of a presentee for a particular charge depended on the question of his being acceptable to the people. Lord Fullerton made it manifest that during the last century effect was never given to a presentation except through a favourable judgment of the Presbytery upon the call, and Lord Glenlee maintained that this was evidently the only way in which it was meant to be effectuated according to the Act 1567. Lord Moncreiff contended that the exclusive jurisdiction of the Church carried with it the legality of the Veto Law to all effects.

XI. Mistakes of Mr. Macgeorge as to the Alleged Spiritual Independence of the Existing Established Church.

1. Undoubtedly the judges have taken pains to show that they will not, in ordinary circumstances, interfere with the discipline and order of that Church. Those representing the views of the majority in the cases before the Disruption were and are naturally desirous of making good their doctrine that there can be a reasonable independence in the Church, even though her Courts are not so absolutely co-ordinate with the Civil Court, that the latter may not interfere coercively to prevent excess or abuse of power. On the other hand, judges in the minority would feel themselves bound, at a subsequent stage, to recognise as in some sense an independent jurisdiction what the constituted authorities had declared to be such. But,

2. This state of things does not prove that judges who were in the minority had changed their own minds as to the kind of independence and co-ordinate jurisdiction which they thought should have been recognised as belonging to the Church. It does not follow from their more recent maintenance of the existing law, as viewed by the majority, that they did not still think, as they formerly said, that it was a contradiction in terms to say that a court is supreme and independent, if it be competent for another supreme court to interfere with it on the ground that it is exceeding or abusing its power.

It was the interest of several parties in the old contest to bring the power of law to bear against the energetic action of the Church; but the experience of the Disruption has taught such parties the danger of raising such questions. Thus the Established Church may enjoy a freedom from interference which, were the Free Church to unite with her, could not be

safely relied upon. For the principle of the old decisions still remains untouched—that if, in the judgment of the Court of Session, the Church be found abusing her functions so as to affect civil interests injuriously, that Court may interfere, not merely to adjust those civil interests, but to coerce the Church.

Upon Mr. Macgeorge's own showing, the Established Church has no protection for that kind of co-ordinate jurisdiction that we contended for. He will say that neither have we such protection. I reply, that I hope we have; but that whether or not, we intend, by God's blessing, at all hazards, to defend our own, as we have hitherto been enabled to do.

Special Appendix on the Cardross Case.

Mr. Macgeorge has made such strenuous endeavours, by reiterated assertion, to persuade the public that the spiritual independence of the Free Church has been prostrated by the judgments of the Court of Session in the Cardross case, that it seems worth while to show, by the clearest available evidence, that there is no foundation for his confident averments. Let me, therefore, call attention to the statement of Mr. Murray Dunlop, in which, after the final issue of the last action, besides giving a brief but accurate history of what had occurred from the outset, he summed up the results.[1] He showed, *first*, that the Church was prepared to appeal to the House of Lords against the order for "satisfying production" in an action which had for its main conclusion the reduction of her sentences and the reponing of a deposed minister *ad integrum;* but that, with the declaration of the Court that all her pleas were reserved, the advice of counsel was, that this was not a favour-

[1] Printed Report on Cardross Case, 2nd March, 1864.

able stage for appealing; but that it would be open to her to appeal against all the judgments at a future stage. He showed, *secondly*, that, while rejecting her pleas as pleas for the dismissal of the action at the next stage, all the judges declared that the idea had not occurred to them of the reduction going farther than removing the sentences out of the way as an apparent obstacle to patrimonial redress. "Nobody," said Lord Deas, "contemplates that the defenders are to be ordained to receive the pursuer back into their association; to allow him to sit and vote in their Presbyteries, Synods, and General Assemblies; or that the Free Church congregation at Cardross are to be compelled either to listen to his sermons, or to absent themselves from church, and leave him to preach in it to empty benches." He rested this view on the principle of the Civil Court refusing to go beyond the question of civil or patrimonial interests and their consequences in dealing with matters affecting voluntary associations. Mr Dunlop showed, *thirdly*, that, notwithstanding these declarations, the Free Church regarded the terms of the judgment as so dangerous to the liberty of disestablished Churches, that she was quite prepared to appeal to the House of Lords; but that, having consulted English counsel, they found that while these counsel *considered the objections to the competency well founded*, they advised that the question would be more fairly tried when it was seen what the Scotch Court really meant to do, by looking not merely at their *speeches*, but at their subsequent *judgments*. He showed, *fourthly*, that the soundness of this advice was proved by the Court afterwards finding that they could not follow up their judgments by sending issues to a jury, and by their consequently dismissing the action. He showed, *fifthly*, that the grounds of dismissal were not really *technical*, however much they might appear so, but did in substance amount to a decision in favour of the Free Church. For the Court,

first of all, found that an action for damages could not lie against a collective body like the Free Assembly, not known to the law as a corporation, but could be competently brought only against the individuals. They found, secondly, that they could not give an issue against the individual defenders without the allegation of "malice and want of probable cause." They found, thirdly, that, in the absence of any competent issue for damages, the reductive conclusions were incompetent. Mr. Dunlop showed, in the *sixth* place, that the dismissal of the actions and the virtual decisions in her favour deprived the Church of a fair opportunity for trying by appeal the important question raised by the previous judgments, as to the competency for a reductive conclusion at all in such actions.

Mr. Macgeorge asserts with extraordinary confidence that the Free Church was restrained and dismissed in defeat from the Bar, and that she must have felt her ground of spiritual independence to be thereby upset. But these unquestionably true statements of Mr. Dunlop prove that, whatever bearing the decisions may have, as precedents, upon questions of property or emolument, the essential thing in the independence of spiritual jurisdiction was not touched. For the Court disclaimed all along *in words* and finally in *judgment*, the idea of coercing the Church as to her internal government or her congregational arrangements. They prove, secondly, that the first and second judgments cannot be regarded as furnishing any final precedent, even to the point adhered to by the Court, because any fair opportunity of appealing against them was taken away by the Court's own subsequent action, and because the Church would otherwise have taken an appeal. They prove, further, that the opinion of eminent English counsel was against the competency of what the Court had done, Lord Selborne, the late Lord Chancellor, having been one of those counsel.

These are *facts* which Mr. Macgeorge has failed to notice. But they are *facts* which prove his statements to be utterly erroneous and misleading.

Still more erroneous, if possible, are his allegations as to the third action raised by Mr. Macmillan. It was raised, not against the Free Assembly, but against a considerable number of individuals. "The Religious Association of the Free Church," with the moderator and clerks of Assembly, as representing the Association, were called, not as defenders, but only for any interest they might have. There were reductive conclusions, but varied by the alternative, "to the extent to which they may interfere with the pursuer obtaining civil restitution or damages." It was alleged in the condescendence that the individuals were actuated by malice and ill-will, and that their conduct was without probable or reasonable cause. The Lord Ordinary sustained the plea that the "association had no civil or corporate existence so as to be cited as a party," and thus indicated that sentences of Church judicatories as to *status* were beyond the reach of courts of law. In the Inner House, it was stated for Mr. Macmillan that the object of reduction was not that he should be reinstated as a member of the Free Presbytery of Dumbarton, or put in his manse again, but only to clear the way for damages. It was then stated for the individual defenders that they disclaimed any objection to the want of reduction as an obstacle to damages, and were quite willing to put in a minute to that effect. Though objected to by the counsel for Mr. Macmillan, their proposal was adopted by the Court, and such a minute was prepared. Thus, the case was entirely divested of every element which could be interpreted as interfering with the spiritual independence of the Church, and at this stage it was that Mr. Macmillan withdrew from the case, through want of funds, as it is alleged.

The slightest consideration of these particulars is enough to prove that the repeated and strong utterances of Mr. Macgeorge about our defeat in the Cardross case, are wholly without foundation. I now lay before my readers the distinct and fair summing up by Mr. Murray Dunlop. His words are :—

"THE legal results of these proceedings thus finally concluded, may, the Committee conceive, be summed up as follows :—

So far as in favour of the Church, it has been determined—

1st (By the Lord Ordinary, acquiesced in by the pursuer, and mentioned with approval by the Court), That a suspension and interdict to stay the proceedings of the General Assembly in a case of discipline, and to interdict their sentence from being carried into effect, is incompetent.

2nd (By the Court, in the final disposal of the first actions), That an action concluding for damages against a Church judicatory, as such, and its officers as representing it, is incompetent.

3rd (By the Court, on the same occasion), That, in an action of damages against individual members of a Church judicatory for proceedings in a case of discipline in reference to one of its ministers, the pursuer cannot competently insist on his claim of damages without taking an issue of malice and want of probable cause.

4th (Also by the Court, on that occasion), That an action for reduction of a sentence of suspension or deposition, and for being restored thereagainst, standing alone, and not followed in the summons by conclusions for civil reparation, is incompetent.

5th (Opinion stated unanimously on the same occasion), That even when so followed by such conclusions, the reduction is incompetent to any further extent or effect than to admit of, or

secure, such civil reparation, but not to the extent of affecting ministerial status. And,

6th (By the Lord Ordinary, in the new action, with a reclaiming note lodged, but subsequently abandoned), That a non-established religious communion has no such civil or corporate existence as to make it liable to be called as a party before a court of law.

On the other hand, and against the Church, there still stands, technically unrecalled, the interlocutor of July 19, 1861, by which the competency of an action of reduction of a sentence of a Church judicatory, which was limited exclusively to the matter of status, was sustained, without qualification or limitation in the interlocutor, although the conclusion for reduction was total and absolute, and not limited in regard either to its extent or its effects.

Although, however, that interlocutor stands technically unrecalled, not only its authority but also its legal force have been, to a very great extent, modified by what subsequently took place in the cause, inasmuch as—

1st, The judges afterwards explained that they had viewed the reductive conclusions merely as "auxiliary" to the conclusions for damages, and that they did not understand their judgment—as they certainly did not intend it—to sanction the competency of a reduction of sentences of deposition or suspension so as to affect matters of *status* at all, but only to the limited effect of securing, or admitting of, specific civil reparation as regarded damages or patrimonial rights; and,

2nd, So soon as the conclusions for damages fell, and the reductive conclusions were left standing alone, the Court dismissed the actions, on grounds which were truly and substantially grounds of incompetency, and without entering upon the merits of the cause.

This judgment of the Court of July 19, 1861 would still,

however, stand, unaffected by these subsequent proceedings, to this extent, though to this extent only—viz., that where specific civil reparation (properly so called) was concluded for, as damages, or possession of property or funds, reductive conclusions limited to the effect of removing the sentences as obstacles to such reparation, and to that exclusively, would be competent.

Perhaps no very serious interference with discipline need be apprehended from the qualified principle thus asserted, provided the limits were strictly adhered to; but there always would be a risk, if the course of reduction were resorted to at all, that its sphere might be gradually and injuriously extended; and it cannot be concealed that a greater sense of absolute security would have been felt, if the Church had succeeded in getting a judicial recognition of their plea, that reduction was not, in any view, competent at all, as unquestionably it is not necessary for the limited purpose for which alone the Court would sanction it. In judging, however, of the weight which this decision, limited as it is, may, even to its now limited effect, carry with it in future, it will not be left out of view that the opinions of the judges on the several occasions on which the cause was before the Court, are not marked by that consistency of well-considered views, and those characteristics which, apart from mere judicial position, give authority to opinion; and also that there was no acquiescence on the part of the Church, but that, on the contrary, the possibility and opportunity of appealing against that interlocutor was taken from her by the Court having, subsequently, and on grounds substantially of incompetency, dismissed the actions altogether.

On the whole, looking to all the proceedings, and all the opinions, and likewise to the final issue, the Committee believe that these proceedings will not hold out, in time to come, much encouragement to a repetition of the attempt so fruitlessly made

in these actions, and that the Church may rest assured that, as this has been the first instance in the annals of our courts of law, in which a reduction of such sentences was ever tried, so, also, it will be the last.

EDINBURGH, *2nd March*, 1864."

In conclusion, my remonstrances with Mr. Macgeorge may be well wound up by the mention of two facts specially illustrative of the character of that Free Church view which he fails to appreciate.

The first is an incident to which, perhaps, he alludes when he speaks of the counsel for the Church in the Cardross case admitting to "the astonished Court" that, even in an extreme supposition put to him, his clients claimed exemption from civil control. I was myself an eye and ear-witness of the incident. The Court asked the counsel whether exemption was claimed even on an extravagant supposition suggested. The reply was: "*Extreme cases, my Lord, prove nothing. What if the Court of Session were to decide against the Free Church, simply because it is the Free Church?*" Perhaps Mr. Macgeorge means that the Court were struck dumb with astonishment. They certainly were silent after this rejoinder.

The second fact is, that the Free Church authorities steadfastly resisted pressing importunities of the Cardross congregation to take steps for putting their new pastor into possession of the manse until the actions before the Civil Court were dismissed or abandoned. While pressing the claim to independence in the spiritual department to the highest point, they scrupulously abstained from attempting to deal with the temporalities as long as the civil right to them was kept in any kind of doubt.

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